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No. 16222 ✓

VOL. 3099

**United States
Court of Appeals**
for the Ninth Circuit

H. GREENWAY ALBERT and MAJA GREEN-
WAY ALBERT,

Appellants,

vs.

IRA B. JORALEMON,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
District of Arizona**

FILED

FEB 19 1959

No. 16222

United States
Court of Appeals
for the Ninth Circuit

H. GREENWAY ALBERT and MAJA GREEN-
WAY ALBERT,

Appellants,

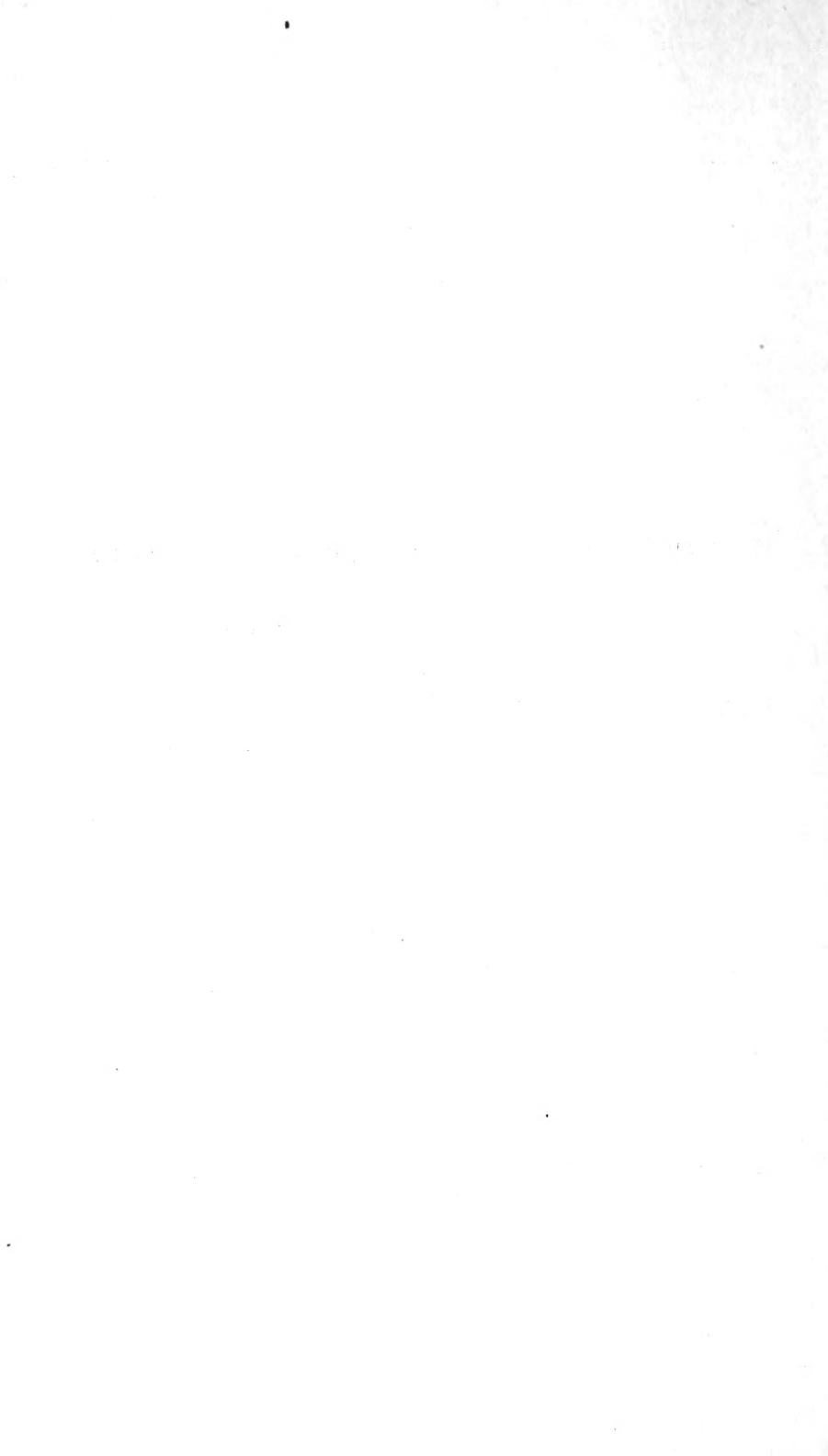
vs.

IRA B. JORALEMON,

Appellee.

Transcript of Record

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District of Arizona



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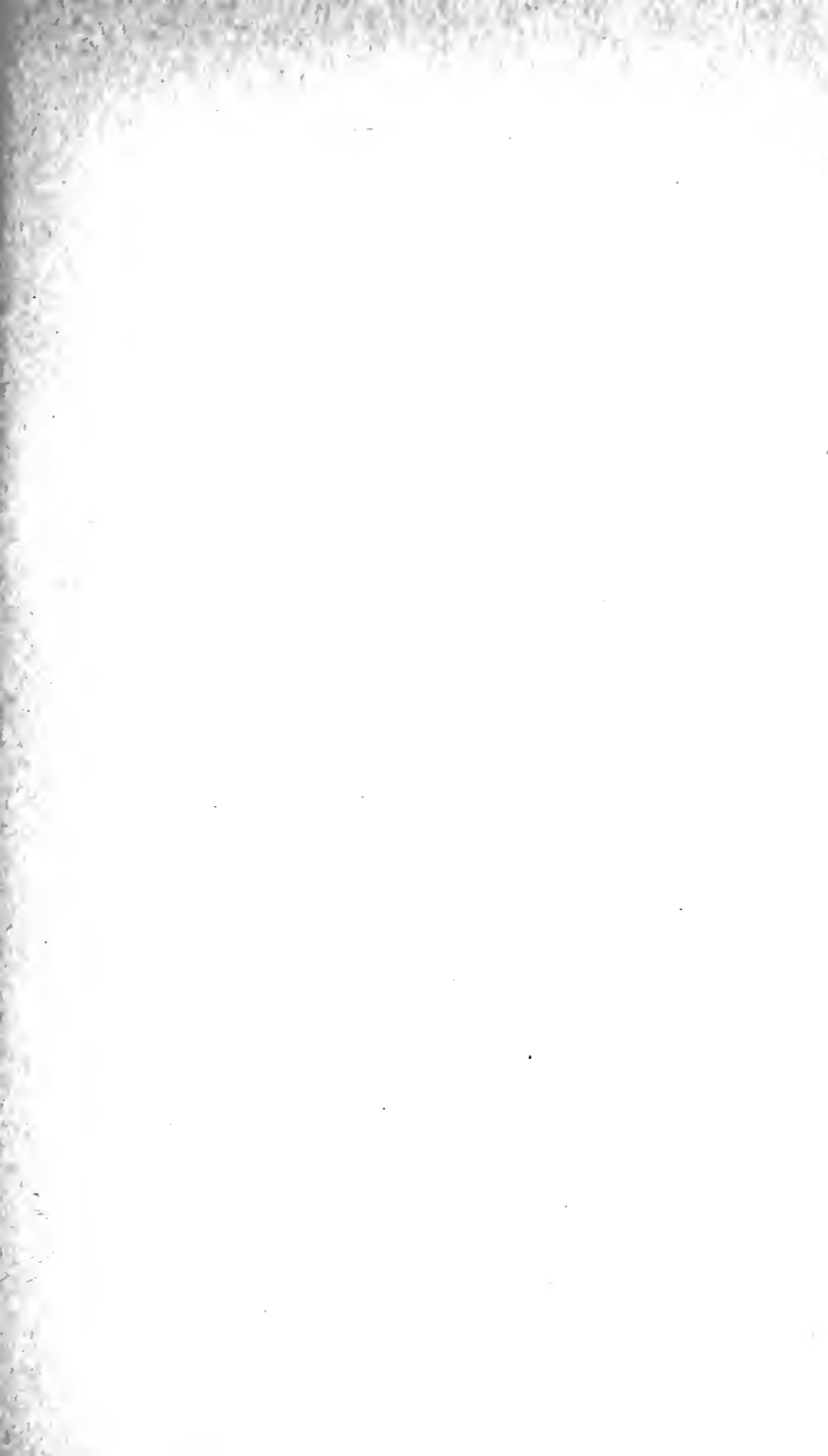
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ATTORNEYS OF RECORD

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Ninth Floor, Valley National Building,
Tucson, Arizona,

Attorneys for Appellee.

In the District Court of the United States
for the District of Arizona

No. Civ. 964—Tucson

IRA B. JORALEMON,

Plaintiff,

vs.

H. GREENWAY ALBERT and MAJA GREEN-
WAY ALBERT, Husband and Wife,

Defendants.

COMPLAINT

Comes Now plaintiff and for his claim against defendants alleges:

1. Plaintiff is a resident and citizen of San Francisco, California and defendants and each of them are residents and citizens of Tombstone, Arizona. The amount in controversy between plaintiff and defendants exceeds the sum of \$3,000 exclusive of costs and interest.

2. The plaintiff as lessee and optionee and the defendants as lessors and optionors did, during the month of September, 1956, enter into a lease and option to purchase agreement, the effective date of which was June 1, 1956, providing for the lease and option to purchase certain unpatented mining claims located in the County of Pima, State of Arizona, and known as Cornelia Extension A, B, C and D, and Cornelia Nos. 1 through 35, inclusive.

3. Said lease and option to purchase agreement contains the following provisions:

“8. In consideration for the lease hereunder, the lessee shall pay to the lessors the following amounts:

“(A) The sum of Two Thousand Dollars (\$2,000.00) heretofore paid and receipt of which amount is hereby acknowledged by Lessors.

“(B) The sum of One Thousand Dollars (\$1,000.00) each month for fourteen (14) additional months commencing on the date Lessors secure the quitclaim deeds or quiet title judgment satisfactory to Lessee as referred to above.

“(C) The sum of Seven Thousand Dollars (\$7,000.00) on or before November 8, 1956.

“(D) Three additional payments of Seven Thousand Dollars (\$7,000.00) each shall be made three (3), six (6), and nine (9) months, respectively, after the date upon which the payment referred to in subparagraph (C) shall be due.”

“7. The parties hereto recognize that there are certain title defects in the claims described, and Lessee desires that Lessors clear their title to said mining claims against the Uranium Corporation of America and Mr. and Mrs. John H. White, Jr., either by securing quitclaim deeds from them or quieting title. Such quitclaim deeds or ultimate judgment in a court action shall be in a form satisfactory to Lessee. If said title defects are not cleared in a manner satisfactory to Lessee within a period of two years from the date hereof, then all rights

between the parties hereto under this agreement shall be terminated. Any legal expense incident to the foregoing paid by Lessee shall be deducted from future payments to Lessors, pro rated over one year's payments as they become due."

"3. Notwithstanding the provisions of paragraph (2) hereof, the lessee may at any time after payment of the first quarterly payment of Seven Thousand Dollars as hereinafter set forth, surrender this lease by giving notice in writing thereof to the lessors, accompanied by an executed and acknowledged quitclaim deed extinguishing all rights of the lessee hereunder and relinquishing to the lessors the demised properties. Upon delivery of such notice and deed and the relinquishment of all the demised properties, all rights and obligations of the parties hereto not then accrued shall cease and terminate. The Lessee agrees to do the necessary assessment work from year to year unless he has withdrawn from this agreement, and provided that such withdrawal shall not be dated between April 1st and July 1st of any year unless the assessment work for that year has been completed. Any notice of withdrawal shall be sent by registered or certified mail to the lessors at Tombstone, Arizona."

"13. * * * It shall be further agreed that said lease may be terminated at any time by the Lessee as to all or any portion thereof by giving the Lessors written notice of such intention, and that upon termination or surrender the Lessee will, upon the request by the Lessors, execute and record in the

appropriate public office a formal release and discharge evidencing such termination, provided that payments hereunder shall continue as provided hereunder until the lease shall have been terminated as to all of the demised properties.”

“14. * * * It shall be agreed, however, that any default claimed and noticed against Lessee as respects the payment of money can be cured by the deposit in escrow in a reputable bank or trust company of the amount in controversy, subject to notice of such deposit to Lessors, and to remain in escrow until decision by court or arbitrators as the parties may elect.”

4. Thereafter, plaintiff caused a quiet title action to be instituted in accordance with the provisions of paragraph 7 of said lease and option to purchase as quoted above. Plaintiff incurred attorney's fees and costs totaling \$601.77 in connection with said quiet title action and in December of 1956, obtained a settlement of said action by the payment of \$4,000 from the plaintiff herein to the defendants in said action to quiet title, in exchange for quitclaim deeds from said defendants. The institution of the aforesaid quiet title action, the incurring of the aforesaid attorney's fees and costs and the payment of the \$4,000 in settlement of said action were all done with the consent and approval of the defendants in this action.

5. Prior to November 5, 1956, plaintiff had paid to defendants all sums required by said lease and

option to be paid; subsequent to November 5, 1956, plaintiff paid to defendants the sum of \$6,218.67.

6. On November 5, 1956, plaintiff mailed to defendants a letter, copy of which is annexed hereto as Exhibit A, by depositing the same in the United States Mail, duly registered or certified, with postage thereon prepaid, addressed to H. Greenway Albert, Tombstone, Arizona; the statements contained in Exhibit A are incorporated herein.

7. The plaintiff, in reliance upon said letter annexed hereto as Exhibit A as a termination of said lease and option to purchase agreement en toto, abandoned the premises in less than 90 days from the date of said letter, and took no further steps toward the termination of said agreement.

8. Thereafter, the defendants failed to advise plaintiff that they did not accept said letter annexed hereto as Exhibit A as a termination, failed to make any demands for a quitclaim deed or a further release from plaintiff, and failed to indicate to plaintiff in any manner whatsoever that they took the position that the lease and option to purchase agreement was still in effect until a letter from defendants' attorneys dated April 16, 1957, was mailed to plaintiff, a copy of which said letter is annexed hereto as Exhibit B. Defendants presently assert that the payments provided for under said lease and option have continued to accrue and that they will in the future continue to accrue until and unless plaintiff has actually paid to defendants the amounts as-

serted by defendants to be due up through the date of such payment.

9. If defendants had advised plaintiff subsequent to the receipt by defendants of the letter annexed hereto as Exhibit A, before any other payments had accrued under the terms of said lease and option, that they took the position that said letter did not terminate the lease and option to purchase agreement, plaintiff would have immediately executed and served upon defendants another notice of termination of said lease and option to purchase agreement in a form to satisfy defendants' objections; plaintiff stood ready, willing and able at all times subsequent to his letter to defendants annexed hereto as Exhibit **A to furnish** defendants with a quitclaim deed to the mining claims covered by said lease and option to purchase agreement, or a release and discharge evidencing such termination. If said defendants had demanded such quitclaim deed or formal release and discharge from plaintiff, the same would have been furnished to them immediately. If said defendants had informed plaintiff that they took the position that such a quitclaim deed or formal release and discharge had to be furnished as a prerequisite to termination, the plaintiff would have furnished the same immediately.

10. On May 31, 1957, plaintiff deposited in the downtown office of The Valley National Bank of Phoenix, a national banking association, at Tucson, Arizona, the sum of \$23,000, which is an amount in excess of the amount claimed by defendants to be

due from plaintiff under the terms and provisions of said lease and option to purchase agreement on said date and delivered with said deposit a letter of escrow instructions, copy of which is annexed hereto as Exhibit C.

11. On May 31, 1957, plaintiff caused to be served upon defendants a letter dated May 31, 1957, a copy of which is annexed hereto as Exhibit D; together with said letter dated May 31, 1957, the defendants were, on May 31, 1957, furnished with a quitclaim deed from the plaintiff and Dorothy Joralemon, his wife, quitclaiming to the defendants all right, title and interest the plaintiff and his wife had in and to the mining claims covered by said lease and option to purchase agreement; the statements contained in Exhibit D are incorporated herein.

Wherefore, plaintiff prays as follows:

1. For a declaration of the parties' rights and obligations under the lease and option to purchase agreement between plaintiff and defendants bearing the effective date of June 1, 1956.

2. An adjudication that the aforesaid lease and option to purchase agreement was terminated by service upon defendants of plaintiff's letter annexed hereto as Exhibit A.

3. Adjudicating that plaintiff has paid to defendants all sums the defendants are entitled to under said lease and option to purchase agreement.

4. Adjudicating that plaintiff is entitled to all of

the funds placed in escrow with The Valley National Bank of Phoenix as alleged herein.

5. For costs incurred herein by plaintiff.

6. For such other and further relief as may be proper.

BOYLE, BILBY, THOMPSON
& SHOENHAIR, .
/s/ RALPH W. BILBY,
/s/ WILBERT E. DOLPH, JR.,
Attorneys for Plaintiff.

EXHIBIT A

November 5, 1956.

Mr. H. Greenway Albert,
P.O. Box 246,
Tombstone, Arizona.

Dear Greenway:

As we have found no ore in five drillholes, on your Cornelia group of claims, I am reluctantly forced to surrender the lease and option to me on the 39 claims in the Ajo mining district that was signed by you and Mrs. Albert on September 21, 1956. The \$7000 payment due on November 8, 1956, will be paid when due, and the quitclaim deed specified in Paragraph 3 of the contract will be sent to you as soon as practicable.

While we found a little lean disseminated copper bearing porphyry in one hole, our drilling proved

that in most of the area either deep conglomerate or barren pre-Cambrian micaceous quartzite underlie 100 to 200 feet of alluvium. There is not room for a valuable ore body between these two barren formations.

I am sorry we did not have better luck in the exploration.

Yours sincerely,

/s/ IRA B. JORALEMON.

IBJ:B

cc: Mrs. Maja Greenway Albert
Mr. Charles E. Connor
Dr. D. H. McLaughlin
Mr. Kenneth C. Kellar

EXHIBIT B

(Copy)

Conner & Jones
509-514 Valley National Building
P.O. Box 310
Tucson, Arizona

April 16, 1957.

Mr. Ira B. Joralemon,
c/o Homestake Mining Company,
100 Bush Street,
San Francisco 4, California.

Re: Lease and Option to Purchase

Dear Mr. Joralemon:

We are writing this letter at the request of Mr. H. Greenway Albert and his wife, Maja Greenway Albert, of Tombstone, Arizona, in connection with that certain Lease and Option to Purchase which was entered into by and between H. Greenway Albert and Maja Greenway Albert, husband and wife, as lessors and optionors, and Ira B. Joralemon, as lessee and optionee.

We call attention to paragraph 2 of said agreement which provides that the lease shall commence as of the first day of June, 1956, and shall expire March 31, 1976, unless sooner terminated in the manner thereafter provided in said agreement. Paragraph 3 of said agreement provides that the lessee may at any time after the payment of the first quarterly payment of \$7000.00 surrender the lease by giving notice in writing thereof to the lessors, accompanied by an executed and acknowledged quitclaim deed extinguishing all rights of the lessee thereunder and relinquishing to the lessors the demised properties. Said paragraph further provides that upon delivery of such notice and deed and the relinquishment of all of the demised properties, all rights and obligations of the parties thereto not then accrued shall cease and terminate, and also provides that lessee may not withdraw from said lease agreement between April 1st and July 1st of any year unless the assessment work for that year has been completed.

On November 5, 1956, you wrote a letter to Mr.

Albert in which you advised him that you were forced to surrender the lease and option. In your letter you further stated that the \$7000.00 due on November 8, 1956, would be paid when due "and the quitclaim deed specified in paragraph 3 of the contract will be sent to you as soon as practicable." It is our opinion that your letter of November 8, 1956, in no way complies with the provisions of paragraph 3 of said agreement. Furthermore, as of this date no quitclaim deed, as provided for in said agreement, has been delivered to the lessors.

Therefore, it is our clients' position that the lease and option to purchase is still in full force and effect and they have advised us that there are five monthly payments of \$1000.00 each due, and, also, the quarterly payment of \$7000.00 due on February 8, 1957, has not been paid, and demand is hereby made upon you for the payment of said sums totaling \$12,000.00, less that portion of the legal expense of \$601.77 which you would be entitled to be reimbursed for.

In November of 1956, Mr. and Mrs. Albert received a check from the Homestake Mining Company for \$3932.15 which purported to be the quarterly payment of \$7000.00 due on November 8, 1956, from which you deducted the sum of \$3067.85, claiming that to be the correct amount to deduct for legal expenses.

We wrote Mr. R. E. Driscoll, Jr., on November 21, 1956, advising him that our calculations showed that only the sum of \$250.74 should have been de-

ducted from said payment of \$7000.00. We also advised him that the \$4000.00 which was paid in settlement of the suit to quiet title was not a legal expense under the terms of the contract.

On November 26, 1956, Mr. Driscoll advised us that we would no doubt be hearing from San Francisco, either directly or through his office, in the near future in reply to our letter of November 21, 1956. To date we have not received any such reply. However, on December 31, 1956, a check in the sum of \$1286.52 was sent to Mr. Albert with the simple explanation that the same covered an error made in computation in regard to the prior check. Our calculation shows that you still owe Mr. and Mrs. Albert the sum of \$1535.59 in connection with the quarterly payment due on November 8, 1956.

Our clients are assuming that you will live up to the terms of the Lease and Option to Purchase and do the assessment work on the mining claims covered by the agreement for this year.

Our clients take the position that the Lease and Option to Purchase agreement is still in full force and effect, and demand is hereby made upon you for full compliance therewith, and consequently have not cashed the checks mentioned in this letter, to wit, one for \$3932.15 and one for \$1286.52.

Yours very truly,

CONNER & JONES,

By /s/ CHARLES E. CONNER.

Copy to Dr. Donald H. McLaughlin.

“ “ Keller & Keller & Driscoll, Lead.

EXHIBIT C

Law Offices

Boyle, Bilby, Thompson & Shoenhair

Ninth Floor Valley National Building

Tucson 1, Arizona

Telephone MAin 3-8661

May 31, 1957.

The Valley National Bank of Phoenix,
Downtown Office,
Tucson, Arizona.

Gentlemen:

We are handing you herewith Cashier's Check in the sum of \$23,000.00, payable to your order. This check is furnished you by Mr. Ira B. Joralemon and is to be held by you in escrow pursuant to the provisions of paragraph 14 of that certain Lease and Option to Purchase entered into between H. Greenway Albert and Maja Greenway Albert and the said Ira B. Joralemon as of June 1, 1956, until such time as the rights of the parties to said lease and option be determined, either by action in court or by arbiters, of which you will be duly advised.

We are also enclosing herewith a copy of said Lease and Option to Purchase above mentioned, together with a copy of a letter to Mr. and Mrs. Greenway Albert of date May 31, 1957, relating to this matter.

Very truly yours,

BOYLE, BILBY, THOMPSON &
SHOENHAIR,

By /s/ RALPH W. BILBY.

RWB:LJE

Enc.

EXHIBIT D

Law Offices

Boyle, Bilby, Thompson & Shoenhair
Ninth Floor Valley National Building
Tucson 1, Arizona
Telephone MAin 3-8661

May 31, 1957.

Mr. H. Greenway Albert,
Mrs. Maja Greenway Albert,
Tombstone, Arizona.

Dear Mr. and Mrs. Albert:

We are attorneys for Mr. Ira B. Joralemon, with whom you entered into a Lease and Option to Purchase covering certain mining claims in Pima County, Arizona, known as Cornelia Extension A, B, C and D and Cornelia Nos. 1 to 35, inclusive, being a total of 39 mining claims. Said Lease and Option to Purchase was entered into as of June 1, 1956.

Under the provisions of said Lease and Option to Purchase Mr. Joralemon had the right to terminate

said lease and option and surrender the same by giving notice thereof to you in writing. Under date of November 5, 1956, Mr. Joralemon notified you in writing that he was surrendering the said lease and option and that a quitclaim deed, covering said mining claims, would be sent to you as soon as practicable.

Without in any manner receding from the position that said lease and option was terminated by Mr. Joralemon's written notice to you of date November 5, 1956, you are hereby further notified that said lease and option was then and is now hereby terminated.

On April 16, 1957, your attorneys, Messrs. Conner and Jones, notified Mr. Joralemon by letter of date April 16, 1957, that, according to your contention, the lease and option had not been terminated by Mr. Joralemon's letter of November 5, 1956, and that you were claiming that the said lease and option was still in effect and that certain payments were due you as in said letter specified.

From reading said letter we take it that you and your attorneys contend that there is now due you under said lease and option the sum of \$22,535.59.

We have, therefore, pursuant to the provisions of paragraph 14 of said lease and option, placed an amount in excess of said sum in escrow with The Valley National Bank of Phoenix at its Downtown Office in Tucson, Arizona, with instructions to hold the same in escrow until decision of court or ar-

biters as the parties may elect as to the rights of the parties under the circumstances. We enclose herewith a copy of our letter of instructions to the said The Valley National Bank of Phoenix covering said escrow.

You are also hereby advised that, although it is Mr. Joralemon's position that he is not required to do the annual assessment work on your mining claims, said assessment work was done for the year 1956-1957 prior to November 5, 1956, and for your convenience an affidavit establishing the fact that said annual assessment work was done will be placed of record in the office of the County Recorder of Pima County, Arizona, and a copy thereof furnished to you, all prior to July 1, 1957.

There is also enclosed herewith a quitclaim deed covering all of said mining claims running from Mr. Joralemon and his wife to yourselves although you have made no demand therefor.

Very truly yours,

BOYLE, BILBY, THOMPSON
& SHOENHAIR,

By /s/ RALPH W. BILBY.

RWB:LJE

Enc.

[Endorsed]: Filed May 31, 1957.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM

Defendants answer Plaintiff's complaint as follows;

I.

They admit the allegations of Paragraphs I and II.

II.

They admit the allegations of Paragraph III, and they allege that the said Lease and Option to Purchase Agreement contained many other provisions bearing upon the matters and things set forth in Plaintiff's Complaint.

III.

They deny the allegations of Paragraph IV with respect to the times of the filing of the said Quiet Title action and the settlement thereof, and allege that said Quiet Title action was instituted, settled and fully disposed of prior to the execution of the Lease and Option to Purchase Agreement. They admit that Plaintiff incurred attorney's fees and costs in the amount alleged. They admit that the sum of Four Thousand and No/100 (\$4,000.00) Dollars was paid by the Plaintiff to settle the said Quiet Title action. They admit that the incurring of the said fees and costs and the settlement of said action were done with the consent and approval of the Defendants. They allege that the Plaintiff paid said sum of Four Thousand and No/100 (\$4,000.00) Dollars in settlement of said Quiet Title action

upon the agreement of the parties that Plaintiff could do so with his own money if he wished to, without any right of reimbursement by the Defendants.

IV.

They admit the allegations of Paragraphs V and VI.

V.

They state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph VII except they admit that Plaintiff took no further steps toward the termination of said agreement.

VI.

They deny that they failed to advise the Plaintiff in any respect whatsoever and allege that they conformed strictly with the terms of the written contract. Defendants admit that they assert that the payments provided for under said Lease and Option continued to accrue and have accrued in accordance with the terms of said contract to the 31st day of May, 1957.

VII.

They state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph IX.

VIII.

They admit the allegations of Paragraphs X and XI.

IX.

They allege that the said Contract of Lease and Option remained in full force and effect until terminated May 31, 1957, and that Plaintiff is now indebted to the Defendants in accordance with the terms of said contract.

Wherefore, Defendants pray that Plaintiff take nothing by his Complaint and that Defendants recover their costs and for all of the proper relief.

McCARTY, CHANDLER &
UDALL,

By /s/ CHARLES D. McCARTY,
Attorneys for Defendants.

Counterclaim

Defendants by way of Counterclaim against the Plaintiff allege:

I.

In the month of September, 1956, Plaintiff and Defendants entered into a Lease and Option to Purchase certain mining claims in Pima County, Arizona.

II.

Said Lease and Option to Purchase was terminated pursuant to the power to terminate therein contained by the Plaintiff May 31, 1957.

III.

Pursuant to the terms of said Lease and Option to Purchase, Plaintiff became and now is indebted to the Defendants in the sum of Twenty-one

Thousand One Hundred Seventy-nine and 56/100 (\$21,179.56) Dollars, together with interest from due dates which said sum the Plaintiff has refused and does now refuse to pay, although proper demand has been made for payment.

Wherefore, Defendants pray judgment against the Plaintiff in the sum of Twenty-one Thousand One Hundred Seventy-nine and 56/100 (\$21,179.56) Dollars, together with interest at the legal rate from due dates until paid and for all of the proper relief.

McCARTY, CHANDLER
& UDALL,

By /s/ CHARLES D. McCARTY,
Attorneys for Defendants.

Affidavit of mail attached.

[Endorsed]: Filed July 5, 1957.

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM

Comes now plaintiff in the above entitled action and replies to the counterclaim filed herein by the defendants as follows:

1. Admits the allegations contained in paragraph I.
2. Denies the allegations contained in paragraph II and in this connection alleges that said

Lease and Option to Purchase Agreement was terminated on November 5, 1956.

3. Denies the allegations contained in paragraph III.

Wherefore, Plaintiff prays that Defendants take nothing by their counterclaim.

BOYLE, BILBY, THOMPSON
& SHOENHAIR,

/s/ WILBERT E. DOLPH, JR.,
Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed July 16, 1957.

[Title of District Court and Cause,]

MINUTE ENTRY OF FRIDAY,
OCTOBER 4, 1957

Tucson Division

Honorable James A. Walsh,

United States District Judge, Presiding

Wilbert Dolph, Esq., appears for the plaintiff; Charles D. McCarty, Esq., is present for the defendants. Pretrial hearing is now had. The Defendants are granted leave to amend counterclaim to add an additional count covering claimed cause of action for counter-defendants' removal of well casing from leased premises. The Court orders separate trial of issues which will be formed by such count, and counter-defendants' answer thereto.

It is stipulated that the letter marked (1) in pencil by the Court may be received in evidence without foundational proof if ruled otherwise admissible.

It is stipulated that the vouchers marked 2 to 7, inclusive, in pencil by the Court may be received in evidence on trial upon offer by either party.

[Title of District Court and Cause.]

AMENDED COUNTERCLAIM

Defendants by way of Counterclaim against the Plaintiff allege:

Count One

I.

In the month of September, 1956, Plaintiff and Defendants entered into a Lease and Option to Purchase certain mining claims in Pima County, Arizona.

II.

Said Lease and Option to Purchase was terminated pursuant to the power to terminate therein contained by the Plaintiff, May 31, 1957.

III.

Pursuant to the terms of said Lease and Option to Purchase, Plaintiff became and now is indebted to the Defendants in the sum of Twenty-One Thousand One Hundred Seventy-Nine and 56/100 (\$21,179.56) Dollars, together with interest from

due dates which said sum the Plaintiff has refused and does now refuse to pay, although proper demand has been made for payment.

Count Two

I.

In the month of September, 1956, Plaintiff and Defendants entered into a Lease and Option to Purchase certain mining claims in Pima County, Arizona.

II.

That at the time of the execution of said Lease and Option it was within the contemplation of the parties that the Plaintiff would do certain exploration work on the leased premises and would among other things cause test holes to be drilled on the said property and casing to be installed in said test holes. Said Lease and Option further provided that no casing would be removed from test holes until Plaintiff had paid to Defendants the sum of Twenty-Five Thousand and No/100 (\$25,000.00) Dollars. That thereafter Plaintiff took possession of said leased premises and caused test holes to be drilled and casing to be installed in said test holes. That notwithstanding the fact that the Plaintiff had not and has not paid to the Defendants the sum of Twenty-Five Thousand and No/100 (\$25,000.00) Dollars, and notwithstanding the provisions of the said Lease and Option, Plaintiff removed or caused to be removed the casing from some or all of the said test holes.

III.

That by virtue of the provisions of said Lease and Option Agreement, Plaintiff is indebted to the Defendants in the sum of Twenty-Five Thousand and No/100 (\$25,000.00) Dollars less sums heretofore paid by Plaintiff to Defendants and less whatever further sums may be adjudicated to be due and owing to Defendants by the Plaintiff under Count One of this Counterclaim.

Wherefore, Defendants pray judgment against the Plaintiff in the sum of Twenty-Five Thousand and No/100 (\$25,000.00) Dollars, subject however to a credit for sums heretofore paid by the Plaintiff to Defendants, and subject to a future credit for such sums as may be adjudicated due and payable to Defendants by Plaintiff under Count One of this Counterclaim, together with interest at the legal rate from due date until paid and for all of the proper relief.

McCARTY, CHANDLER
& UDALL,

By /s/ CHARLES D. McCARTY,
Attorneys for Defendants.

Affidavit of mail attached.

[Endorsed]: Filed October 8, 1957.

[Title of District Court and Cause.]

REPLY TO AMENDED COUNTERCLAIM

Comes Now the plaintiff and replies to defendants' amended counterclaim as follows:

Count One

1. Admits the allegations contained in paragraph I.

2. Denies the allegations contained in paragraph II, and in this connection alleges that said Lease and Option to Purchase agreement was terminated November 5, 1956.

3. Denies the allegations contained in paragraph III.

Count Two

1. Admits the allegations contained in paragraph I.

2. Referring to the allegations contained in paragraph II, plaintiff admits that it was within the contemplation of the parties that the plaintiff would do certain exploration work on the leased premises and would cause test holes to be drilled on said property and that no casing would be removed from said test holes until plaintiff had paid to defendants the sum of \$25,000.00 under the schedule of payments provided in said agreement, and that plaintiff caused certain test holes to be drilled on said premises and that the plaintiff had not, and

has not, paid to defendants the sum of \$25,000.00. Plaintiff denies that it was ever the contemplation or agreement of the parties that casing was to be installed in all of said test holes or in any of said test holes necessarily, and denies that plaintiff has removed or caused to be removed the casing from some or all of said test holes. In this connection plaintiff alleges that the agreement between the parties required the plaintiff to leave the casing in such test holes only where such casing was necessary, and further alleges that no casing was removed or caused to be removed from said test holes by plaintiff.

3. Denies the allegations contained in paragraph III.

4. Denies all allegations in Count Two not expressly admitted herein.

Wherefore, plaintiff prays that defendants take nothing by their amended counterclaim.

BOYLE, BILBY, THOMPSON
& SHOENHAIR,

/s/ WILBERT E. DOLPH, JR.,
Attorneys for Plaintiff.

Affidavit of mail attached.

[Endorsed]: Filed October 10, 1957.

[Title of District Court and Cause.]

MINUTE ENTRY OF FRIDAY,
FEBRURY 21, 1958

Honorable James A. Walsh, United States District
Judge, Presiding.

This case comes on regularly for trial this day before the Court sitting without a jury. The plaintiff Ira B. Joralemon is present with his counsel, Ralph Bilby, Esq., and Wilbert Dolph, Esq. The defendant H. Greenway Albert is present with his counsel, Charles D. McCarty, Esq. On motion of said counsel for the defendants.

It Is Ordered that Charles Gatewood, Esq., is associated as counsel for the defendants herein.

On stipulation of counsel,

It Is Ordered that Count 2 of the amended counterclaim is stricken.

Counsel for the plaintiff move to amend the complaint to show "plaintiff is a resident and citizen of San Francisco, California, and that the defendants are residents and citizens of the State of Arizona."

Counsel stipulate to amend allegation V of the complaint.

Both sides announce ready for trial.

Wilbert Dolph, Esq., makes the opening statement on behalf of the plaintiff. Charles D. McCarty, Esq., makes the opening statement on behalf of the defendants.

Plaintiff's Case

Ira B. Joralemon is sworn and examined on his own behalf.

The following plaintiff's exhibits are admitted in evidence: 1, agreement; 2, agreement; 3, agreement; 4, copy of letter; 5, letter; 6, letter; 7, copy of letter.

The following defendants' exhibits are admitted in evidence: B, copy of letter; A, copy of letter; C, letter; D, letter.

Robert E. Driscoll, Jr., is sworn and examined.

The following plaintiff's exhibits are admitted in evidence: 8, memo agreement; 9, letter; 10, letter.

The following defendants' exhibits are admitted in evidence: E, letter; G, copy of agreement.

And thereupon, at 12:00 noon, It is Ordered that the further trial of this case is continued to 1:30 p.m. this date, to which time counsel and all parties are excused. Subsequently, at 1:30 p.m., all counsel and parties being present pursuant to recess, further proceedings of trial are had as follows:

Plaintiff's Case Continued

Robert E. Driscoll, Jr., is recalled and further examined.

The following defendants' exhibits are admitted in evidence: I, lease and option to purchase; K, letter; L, memorandum.

H. Greenway Albert is sworn and cross-examined by the plaintiff.

Whereupon, the plaintiff rests.

Defendants' Case

Counsel stipulate that payments were made by the plaintiff to the defendants as follows:

\$2,000.00 prior to September 20, 1956, pursuant to 8a of Agreement. \$1,000.00 on September 26, 1956, pursuant to paragraph 8c of Agreement. \$1,000.00 on October 7, 1956, pursuant to Paragraph 8e of Agreement. \$1,000.00 on November 6, 1956, pursuant to Paragraph 8e of Agreement.

that further payment was made on November 6, 1956, in the amount of \$3,932.15; that a payment was made on December 31, 1956, in the amount of \$1,286.52; that in all cases the dates are the dates appearing on vouchers themselves; and that the vouchers may be admitted in evidence.

The following defendants' exhibits are admitted in evidence: M, vouchers; J, lease and option to purchase; H, copy of letter.

Whereupon, the defendants rest.

Memorandums are to be submitted by counsel 15 days from this date, memoranda to be submitted simultaneously, and that when memorandums have been filed, the matter will stand submitted and by the Court taken under advisement.

[Title of District Court and Cause.]

OPINION

Minute Entry of Tuesday, March 25, 1958

Honorable James A. Walsh, United States District Judge, Presiding.

The Court concludes, inter alia, that:

1. The payment of the first quarterly payment of \$7,000.00 (less a deduction computed in accordance with Paragraph 7 of Exhibit 3 In Evidence for legal expense incurred in clearing title to the mining claims) was a condition precedent to the exercise by plaintiff of his option to terminate the lease.

2. The \$4,000.00 paid on behalf of the plaintiff to compromise the quiet title action was not a legal expense within the meaning of the lease and option contract.

3. The delivery to defendants of an executed and acknowledged quitclaim deed was a condition precedent to the exercise by plaintiff of his option to terminate the lease.

4. Defendants are not estopped to claim and contend that Exhibit 3 In Evidence remained in force and effect and that plaintiff's obligations thereunder continued to accrue and be binding until May 31, 1957, when plaintiff terminated the lease and option.

5. Defendants are entitled to judgment on count one of their amended counterclaim, in accordance with the foregoing.

Defendants will prepare, serve and lodge proposed findings of fact, conclusions of law, and formal judgment in accordance with the local rules.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY, MAY 5, 1958

Honorable James A. Walsh, United States District Judge, Presiding.

This case comes on regularly this day for settlement of Findings. Ralph Bilby, Esq., and Wilbert Dolph, Esq., appear for the plaintiff. Charles D. McCarty, Esq., appears for the defendants. Hearing is now had, and the matter is submitted for review by the Court in light of the arguments.

[Title of District Court and Cause.]

MINUTE ENTRY OF TUESDAY, JUNE 10, 1958

Honorable James A. Walsh, United States District Judge, Presiding.

This case comes on regularly this day for settlement of findings. Wilbert Dolph, Esq., appears for the plaintiff; Charles D. McCarty, Esq., appears for the defendants.

Findings of Fact and Conclusions of Law are now signed by the Court and filed with the Clerk.

It Is Ordered that counsel for the plaintiff is to prepare form of judgment.

[Title of District Court and Cause.]

Oral Argument Requested

FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY PLAINTIFF

Comes Now plaintiff and proposes that the Court make the following findings of fact and conclusions of law.

Findings of Fact

1. The plaintiff as lessee and the defendants as lessors entered into the following agreements on the dates indicated beside each:

Exhibit 1 on March 21, 1956;

Exhibit 2 on May 16, 1956;

Exhibit 3 during September, 1956.

2. Exhibit 2 was negotiated and executed for the primary purpose of providing for the matter of clearing a cloud from the title of the mining claims referred to therein.

3. Exhibit 2 was prepared by defendants' attorney.

4. The firm of Conner & Jones, as attorneys for the defendants in this action, instituted an action

and conducted negotiations resulting in the elimination of the cloud on the title referred to in finding No. 2 above.

5. The defendants incurred expenses in connection with clearing said cloud as follows:

\$4,000.00 as consideration for a release of all claims;

\$601.77 as attorneys' fees and costs incident to quiet title action.

The plaintiff supplied the funds with which said expenses were paid, with the consent and approval of the defendants Albert.

6. The cloud on the title referred to above was cleared in the latter part of August, 1956.

7. Subsequent to August, 1956, the plaintiff paid, or procured the payment, to the defendants of the following amounts at the following times.

\$1,000.00 on or about September 20, 1956;

\$1,000.00 on or about October 7, 1956;

\$1,000.00 on or about November 6, 1956;

\$3,932.15 on or about November 6, 1956;

\$1,286.52 on or about January 4, 1957.

8. The defendants, within a few days after November 5, 1956, received the letter, a copy of which is Exhibit 4 in evidence. The defendants realized, upon receiving said letter, that the plaintiff intended to terminate the agreement which is Exhibit 3 in evidence and that plaintiff intended said letter to serve as notice of such termination.

9. On or about November 16, 1956, the defendant, Mr. Albert, telephoned the plaintiff in San Francisco. During his conversation with the plaintiff Mr. Albert stated that he was not satisfied with the amount of money he had received on or about November 6, 1956. During this conversation the plaintiff again informed said defendant that he intended to terminate the lease agreement which is Exhibit 3 in evidence. Said defendant thereupon requested information from the drilling logs on the mining claims covered by said lease, but did not state that he considered the payment of any certain amount or the delivery of a quitclaim deed as a condition precedent to the exercise of the plaintiff's option to terminate.

10. Shortly after November 16, 1956, the defendant, Mr. Albert, went to his attorney and discussed with him the matter of the payment called for under paragraph 8(c) of Exhibit 3 in evidence, and also asked his attorney whether the defendants were entitled to a quitclaim deed on the strength of the plaintiff's letter dated November 5, 1956. The defendants' attorney thereupon advised the defendant, Mr. Albert, that he had a right to demand such a deed; this same advice was given to the defendant again in March, 1957.

11. The information requested by the defendant, Mr. Albert, in his telephone conversation of November 16, 1956, was promptly furnished by the plaintiff in his letter, which is Exhibit 5 in evidence.

12. On April 16, 1957, the defendants' attorney, at the request of defendants, prepared and sent to

the plaintiff a letter, copy of which is Exhibit 7 in evidence.

13. Neither of the defendants nor anybody acting for them ever advised the plaintiff or any of plaintiff's agents, prior to the delivery of Exhibit 7, that the defendants took the position that either the payment of an additional amount on the quarterly payment falling due November 8, 1956, or the delivery of a quitclaim deed was a condition precedent to the termination of the lease by the plaintiff.

14. On or about November 21, 1956, the defendant, Mr. Albert, had his attorney prepare and send to the plaintiff's attorney a letter which appears as Exhibit 6 in evidence.

15. If the defendants or either of them had stated to the plaintiff that they took the position that payment of the correct amount on the quarterly payment falling due November 8, 1956, was a condition precedent to the plaintiff's right to terminate, the plaintiff would have immediately either paid the amount they claimed to be correct or deposited said amount in escrow.

16. If the defendants or either of them had either demanded from the plaintiff a quitclaim deed or stated to the plaintiff that they took the position that the delivery of a quitclaim deed was a condition precedent to the plaintiff's right to terminate, the plaintiff would have immediately furnished to them such a quitclaim deed.

17. The plaintiff's failure to either pay to the defendants the amount they claimed to be proper under the quarterly payment falling due November 8, 1956, or to deposit said amount in escrow was due to the defendants' failure to inform the plaintiff that the defendants took the position that the payment of said amount was a condition precedent to the plaintiff's right to terminate.

18. The plaintiff's failure to furnish the defendants with a quitclaim deed immediately after November 5, 1956, was due to the defendants' failure to either demand such a quitclaim deed or to inform the plaintiff that the arrangement suggested by plaintiff of supplying said deed at a later date was not satisfactory, or that the defendants took the position that the delivery of such a quitclaim deed was a condition precedent to plaintiff's right to terminate.

19. The actions of the defendants between November 5, 1956, and April 16, 1957, led the plaintiff to believe that the lease had been terminated and that the defendants' only claim against the plaintiff was a claim for an additional amount on the quarterly payment falling due November 8, 1956.

20. Subsequent to November 5, 1956, plaintiff was led to believe, by the defendants' actions, that there had been a termination of the lease and in reliance upon such belief the plaintiff took no further steps to perfect a termination until after plaintiff received the letter which is Exhibit 7 in evidence.

21. The defendants suffered no damages as a result of plaintiff's failure to pay a larger amount on the first quarterly payment except to the extent of the difference between the amount which was paid and the amount which should have been paid. (This finding of fact is proposed only in the event the Court should conclude that the plaintiff was not entitled to deduct any portion of the \$4,000.00 item.)

22. Defendants suffered no damage as the result of plaintiff's failure to deliver them a quitclaim deed at an earlier date.

23. On May 31, 1957, the plaintiff deposited in the downtown office of the The Valley National Bank of Phoenix, a national banking association, at Tucson, Arizona, the sum of \$23,000, together with a letter of escrow instructions, copy of which is annexed to plaintiff's complaint as Exhibit C.

24. On May 31, 1957, plaintiff caused to be served upon defendants a letter, copy of which is annexed to plaintiff's complaint as Exhibit D, and furnished defendants with a deed from plaintiff and his wife quitclaiming to defendants all right, title and interest the plaintiff and his wife had in and to the mining claims covered by Exhibit 3 in evidence.

25. The Court finds on stipulation of the parties that the plaintiff had performed all obligations required of the plaintiff under Exhibit 3 in evi-

dence, with the exception of the disputed issues of the payment of the first quarterly installment and the delivery of a quitclaim deed.

Conclusions of Law

1. The payment of the first quarterly payment of \$7,000.00 was not a condition precedent to the exercise by the plaintiff of his option to terminate the contract.

2. The sum of \$4,000.00 paid on behalf of the plaintiff to compromise the quiet title action was a legal expense within the meaning of the contract.

3. The execution, acknowledgment and delivery to the defendants of a quitclaim deed, releasing the property described in the contract to the defendants, was not a condition to the exercise by the plaintiff of his option to terminate the contract.

4. The contract of lease and option was terminated by the plaintiff by the letter of November 5, 1956, a copy of which is plaintiff's Exhibit 4 in evidence.

5. Under the terms of Exhibit 3 in evidence the plaintiff unconditionally promised and covenanted to pay defendants the first quarterly payment of \$7,000.00 less proper deductions and plaintiff was obligated to make such payment whether or not he had served notice of termination prior to the due date for such payment.

6. Under the terms of Exhibit 3 in evidence the plaintiff had the right to terminate the lease as to

all or any portion of the claims covered by said lease, and after the service of notice of any such termination the plaintiff had the right to occupy the premises referred to in such notice of termination for a period of 90 days after such termination.

7. Under the terms of Exhibit 3 in evidence the plaintiff promised and covenanted to furnish to the defendants, after the expiration of 90 days from the date of termination as to any portion of the claims covered by said lease, a quitclaim deed or release covering the portion of the property as to which the lease was terminated, and the defendants were entitled to recover from the plaintiff any damages sustained by said defendants as a result of the plaintiff's failure to comply with said obligation.

8. Under the terms of Exhibit 3 in evidence the defendants were not entitled to a quitclaim deed or formal release covering any claims described in a notice of termination served by plaintiff until the expiration of 90 days from the date of such termination.

9. After the expiration of 90 days from the date the defendants received the plaintiff's letter of November 5, 1956, the defendants would have been entitled to a judgment against the plaintiff, quieting the defendants' title in and to all of the mining claims covered by Exhibit 3 in evidence.

10. Defendants are estopped to claim and con-

tend that Exhibit 3 in evidence remained in force and effect and that plaintiff's obligations thereunder continued to accrue and be binding after November 5, 1956, when plaintiff terminated the lease and option.

11. Plaintiff is not indebted to defendants.

12. Plaintiff is entitled to all money deposited in escrow with The Valley National Bank of Phoenix, as alleged in plaintiff's complaint.

13. Plaintiff is entitled to judgment in accordance with these conclusions.

BOYLE, BILBY, THOMPSON
& SHOENHAIR,

/s/ RICHARD B. EVANS,

/s/ WILBERT E. DOLPH, JR.,
Attorneys for Plaintiff.

Affidavit of mail attached.

Lodged April 3, 1958.

[Endorsed]: Filed June 10, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY DEFENDANTS

The Court makes the following Findings of Fact:

1. On or about September 21, 1956, Plaintiff and Defendants entered into a Lease and Option to

purchase agreement wherein Defendants leased to Plaintiff certain unpatented mining claims in Pima County, Arizona. Said Lease and Option agreement provided for the payment by Plaintiff to Defendants of One Thousand Dollars (\$1,000.00) per month rent, plus a quarterly rental payment of Seven Thousand Dollars (\$7,000.00). Said Lease and option agreement further provided that Plaintiff might terminate the same after the payment of the first quarterly payment of Seven Thousand Dollars (\$7,000.00), by giving to Defendants notice in writing of termination, accompanied by an executed and acknowledged quitclaim deed of the demised premises.

2. On or about November 5, 1956, Plaintiff mailed to Defendants a letter stating that Plaintiff was reluctantly forced to surrender the Lease, stating that the Seven Thousand Dollars (\$7,000.00) payment due November 8, 1956, would be paid when due, and further stating that the quitclaim deed provided for in the Lease and Option agreement would be sent to the Defendants as soon as practicable. Said letter was duly received by the Defendants in the due course of the mail.

3. On or about November 6, 1956, Plaintiff by and through his agents mailed to Defendants a check for One Thousand Dollars (\$1,000.00) representing the regular monthly rental payment, and a check for Three Thousand Nine Hundred Thirty-two and 15/100 Dollars (\$3,932.15), representing the first quarterly rental payment of Seven Thou-

sand Dollars (\$7,000.00) less amounts claimed by Plaintiff to be deductible under the contract as legal expense incident to clearing title to the demised premises.

4. On or about November 16, 1956, Defendant Mr. Albert telephoned Plaintiff in San Francisco requesting copies of the logs of the five holes drilled by plaintiff on the demised premises and expressing dissatisfaction over the remittance of November 6, stating that the believed defendants had been underpaid. At this time Plaintiff agreed to send copies of the drilling logs and explained that the adjustment of the difference between them as to money matters would be placed in the hands of his attorneys. Plaintiff promptly sent to defendants the drilling logs requested.

5. On or about November 21, 1956, Defendants through their attorney mailed to the Plaintiff, through his attorney, a letter asserting that the payment of Three Thousand Nine Hundred Thirty-two and 15/100 Dollars (\$3,932.15) was not proper and that Plaintiff was still indebted to the Defendants on account of the first quarterly payment.

6. On or about November 26, 1956, Plaintiff, through his attorney, responded to Defendants' letter of November 21 disagreeing with the position of the Defendants and stating that the Defendants would be hearing from San Francisco either direct or through the office of Plaintiff's attorney.

7. On or about January 4, 1957, Plaintiff,

through his agents, mailed to Defendants a check in the sum of One Thousand Two Hundred Eighty-six and 52/100 Dollars (\$1,286.52), representing an additional payment on account of the first quarterly payment of Seven Thousand Dollars (\$7,000.00) accompanied by a letter stating that the remittance of Three Thousand Nine Hundred Thirty-two and 15/100 Dollars (\$3,932.15) which was made November 6, 1956, had been the result of an error in computation.

8. Neither the check for One Thousand Two Hundred Eighty-six and 52/100 Dollars (\$1,286.52) nor the check for Three Thousand Nine Hundred Thirty-two and 15/100 Dollars (\$3,932.15) were negotiated by the Defendants until after the institution of this litigation.

9. Following receipt of Plaintiff's letter of November 5, and prior to the institution of this litigation the only communication from Plaintiff to Defendants was the telephone call of November 16 from Defendant Mr. Albert to Plaintiff Mr. Driscoll's letter of November 26, the Homestake Mining Company letter of January 4, 1957, enclosing the check, and a letter from Plaintiff dated May 21, 1957, in which Plaintiff stated that he took the position that the Lease had been cancelled by Plaintiff's letter of November 5.

10. On or about May 31, 1957, Plaintiff, through his attorney, mailed to Defendants a letter enclosing a quitclaim deed duly executed and acknowledged.

Said letter and deed were received by Defendants in due course of the mail. On or about May 31, Plaintiff deposited the sum of Twenty-three Thousand Dollars (\$23,000.00) in escrow in the Tucson Downtown Office of the Valley National Bank of Phoenix pursuant to the provisions of paragraph 14 of the Lease and Option agreement.

11. At no time prior to May 31, 1957, did the Plaintiff deliver or tender a quitclaim deed to the premises to the Defendants.

12. The total amount paid by Plaintiff to Defendants under the Lease and Option agreement and on account of the quarterly payment of Seven Thousand Dollars (\$7,000.00) due November 8, 1956, is the sum of Five Thousand Two Hundred Eighteen and 67/100 Dollars (\$5,218.67).

13. When the parties entered into the lease and option it was the intention that Plaintiff could not terminate the lease before, nor until he had made payment of the first quarterly payment of Seven Thousand Dollars (\$7,000.00), and it was their intention at that time, also, that Plaintiff could not terminate the lease before, nor until he executed and delivered to Defendants a quitclaim deed duly acknowledged, quitclaiming to Defendants the demised premises.

15. Neither of the Defendants made any statement or admission or committed any act which indicated to Plaintiff that Defendants did not intend to require the quitclaim deed and the payment of

the first quarterly payment of Seven Thousand Dollars (\$7,000.00), subject to adjustment for proration of legal expense.

16. The failure to deliver the quitclaim deed to the Defendants promptly after 11/6/56 was occasioned by the oversight of John W. Hamilton, secretary of the Homestake Mining Company, or of some other officer or agent of the Homestake Mining Company, and the said John W. Hamilton or such other officer or agent of the Homestake Mining Company in such oversight, were acting as the agents of the Plaintiff within the scope of their authority.

17. The failure of the Plaintiff and of the Homestake Mining Company to deliver the quitclaim deed to the Defendants was not occasioned by any admission, statement, act, or omission of the Defendants, or either of them.

18. The failure to make proper remittance in connection with the Seven Thousand Dollars (\$7,000.00) quarterly payment was occasioned by a dispute between the parties as to what portion of said payment was properly offset by expenditures made by Plaintiff in claiming title to the demised premises and as to the proper proration period of such expenditures.

19. The failure of the Plaintiff and the Homestake Mining Company to make proper payment of the first Seven Thousand Dollars (\$7,000.00) quarterly payment was not occasioned by Plaintiff's

reliance upon any admission, statement, act, or omission of the Defendants, or either of them.

The Court makes the following Conclusions of Law:

1. The payment of the first quarterly payment of Seven Thousand Dollars (\$7,000.00) was a condition precedent to the exercise by the Plaintiff of his option to terminate the contract.

2. The sum of Four Thousand Dollars (\$4,000.00) paid on behalf of the Plaintiff to compromise the quiet title action was not a legal expense within the meaning of the contract.

3. The execution, acknowledgment, and delivery to the Defendants of a quitclaim deed, releasing the property described in the contract to the Defendants, was a condition precedent to the exercise by the Plaintiff of his option to terminate the contract.

4. The contract of lease and option was terminated by the Plaintiff by the letter of May 31, 1957, a copy of which is attached as Exhibit B to Plaintiff's Complaint.

5. Defendants are not estopped to claim and contend that Exhibit 3 in evidence remained in force and effect and that Plaintiff's obligations thereunder continued to accrue and be binding until May 31, 1957, when Plaintiff terminated the lease and option.

6. Defendants are entitled to Judgment against

the Plaintiff in the following amounts on the following due dates:

a. Interest on the sum of Two Thousand Six Hundred Sixteen and 52/100 Dollars (\$2,616.52) from November 8, 1956, to January 8, 1957, at six per cent (6%) per annum. (This was the deficiency on the payment of the first quarterly payment.)

b. The sum of One Thousand Three Hundred Thirty Dollars (\$1,330.00) together with interest thereon from the 8th day of January, 1957, until paid at the rate of six per cent (6%) per annum. (This is the amount still remaining unpaid on the first quarterly payment.)

c. The sum of One Thousand Dollars (\$1,000.00) together with interest thereon at the rate of six per cent (6%) per annum from the 8th day of December, 1956, until paid.

d. The sum of One Thousand Dollars (\$1,000.00) together with interest thereon at the rate of six per cent (6%) per annum from the 8th day of January, 1957, until paid.

e. The sum of Eight Thousand Dollars (\$8,000.00) together with interest thereon at the rate of six per cent (6%) per annum from the 8th day of February, 1957, until paid. (This represents the regular monthly payment of One Thousand Dollars (\$1,000.00) plus the second quarterly payment of Seven Thousand Dollars (\$7,000.00).)

f. The sum of One Thousand Dollars (\$1,000.00) together with interest thereon at the rate of six

per cent (6%) per annum from the 8th day of March, 1957, until paid.

g. The sum of One Thousand Dollars (\$1,000.00) together with interest thereon at the rate of six per cent (6%) per annum from the 8th day of April, 1957, until paid.

h. The sum of Eight Thousand Dollars (\$8,000.00) together with interest thereon at the rate of six per cent (6%) per annum from the 8th day of May, 1957, until paid. (This represents the regular monthly payment of One Thousand Dollars (\$1,000.00) plus the third quarterly payment of Seven Thousand Dollars (\$7,000.00).)

i. For the costs of the Defendants herein incurred and expended.

Dated this day of, 1958.

.....,

Judge of the District Court.

Receipt of copy acknowledged.

Lodged March 28, 1958.

[Endorsed]: Filed June 10, 1958.

[Printer's Note: This document set out as corrected by penciled corrections on original.]

[Title of District Court and Cause.]

Oral Argument Requested

OBJECTIONS TO FINDINGS OF FACT AND
CONCLUSIONS OF LAW PROPOSED BY
DEFENDANTS

Comes Now plaintiff and objects to the proposed findings of fact and conclusions of law submitted by defendants as follows:

Proposed Findings of Fact

1. The first sentence of finding No. 1 is properly a finding of fact. The balance of said proposed finding, however, if appropriate in any place should be under conclusions of law.

2. Defendants' proposed findings Nos. 2, 3, 4, 5, 6 and 7 are attempts to paraphrase what is stated in written instruments in evidence which are themselves the best evidence; the Court should limit its findings in this regard to the facts as to who prepared and sent such instruments, who received them and the times when sent and received, identifying such instruments by their exhibit numbers.

3. Defendants' proposed finding No. 9 is improper in that it fails to refer to plaintiff's letter of November 16, 1956 (Exhibit 5), in which the plaintiff reiterates his intention to terminate and which furnishes the defendant, Mr. Albert, with the information he requested in the telephone call. This proposed finding is improper for the further

reason that it is immaterial; it merely negatives something plaintiff does not claim to exist.

4. Defendants' proposed finding No. 12 combines a fact with a conclusion. The evidence showed that there was paid on November 6, 1956, the sum of \$4,932.15 and that there was a further sum of \$1,286.52 paid on January 4, 1957. It is also a fact that the total of \$5,218.67 was designated by the plaintiff as payment under the quarterly payment provision. It is the position of the plaintiff, however, that on November 6, 1956, after the notice of termination had been sent, only a pro rata share of the monthly payment of \$1,000.00 was required to be made and, therefore, that the excess of the \$1,000.00 check, over and above this pro rata share, should have been applied in satisfaction of any additional amounts which should have been paid on the quarterly payment.

5. Defendants' proposed finding No. 13 should be designated a conclusion from the documentary evidence rather than a finding of fact. This is for the reason that there is no evidence showing that the parties had such an intention and any holding by the Court that the quarterly payment was a condition precedent to the plaintiff's exercise to terminate is of necessity a legal conclusion of the Court from the documents and instruments in evidence and should be designated as such.

6. Defendants' proposed finding No. 14 is subject to the same objections as stated above to defendants' proposed finding No. 13.

7. Defendants' proposed finding No. 15 is improper because the defendants by their actions did lead the plaintiff to believe that they were acting upon the proposition that the plaintiff had terminated the lease, and that the quitclaim deed and the payment of the first quarterly payment of \$7,000.00 were not conditions precedent to such a termination.

8. Defendants' proposed finding No. 16 is incomplete in that it fails to state that one of the reasons for the plaintiff's failure to deliver the quitclaim deed was the defendants' failure to demand such a quitclaim deed.

9. Defendants' proposed finding No. 11 is contrary to the evidence. The plaintiff's letter of November 5, 1956, contains his promise to furnish the deed in question, and this promise was never withdrawn or changed in any regard.

10. Defendants' proposed finding No. 17 is contrary to the evidence, which shows that the plaintiff would have immediately furnished a quitclaim deed if the defendants had demanded one and further shows that the acts of the defendant, Mr. Albert, were designed to and did entitle the plaintiff to assume that there had been a termination.

11. Defendants' proposed finding No. 18 is contrary to the evidence. The evidence shows that the failure to pay to the defendants the amount the defendants claim to be due under the \$7,000.00 quarterly payment provision was due mainly to a

legitimate dispute between the parties as to what the proper amount was. This proposed finding is also misleading in that it fails to set forth that plaintiff's failure to take further steps in this connection to protect his right to terminate was occasioned by defendants' tacit acceptance of termination and the arrangements for determining any amounts due under said provision.

12. Defendants' proposed finding No. 19 is absolutely contrary to the evidence.

Proposed Conclusions of Law

The defendants' proposed conclusions of law are improper under the evidence and the law for the reasons and upon the authority submitted to the Court in plaintiff's memorandum, which is incorporated herein by this reference.

BOYLE, BILBY, THOMPSON
& SHOENHAIR,

/s/ RICHARD B. EVANS,

/s/ WILBERT E. DOLPH, JR.,
Attorneys for Plaintiff.

Affidavit of mail attached.

Lodged April 3, 1958.

[Endorsed]: Filed June 10, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court makes the following Findings of Fact and Conclusions of Law:

I.

Plaintiff is a citizen and resident of the State of California and defendants are residents and citizens of the State of Arizona. The amount in controversy between the parties in this action exceeds the sum of \$3,000.00, exclusive of interest and costs.

II.

On or about September 21, 1956, plaintiff and defendants entered into a Lease and Option to Purchase agreement (Exhibit 3 in evidence) wherein defendants leased to plaintiff certain unpatented mining claims in Pima County, Arizona. The agreement provided for the payment by plaintiff to defendants of \$1,000.00 per month rent, plus a quarterly rental payment of \$7,000.00. The agreement provided further that any legal expense paid by plaintiff incident to clearing title to the leased premises should be deducted from rental payments thereafter becoming due to defendants, prorated over one year's payments as the same became due. The agreement provided further that plaintiff might terminate the same after the payment of the first quarterly payment of \$7,000.00, by giving to defendants notice in writing of termination, accom-

panied by an executed and acknowledged quitclaim deed to the leased premises.

III.

When the parties entered into the Lease and Option agreement, it was their intention that plaintiff could not terminate the agreement before, nor until, he had made payment of the first quarterly payment of \$7,000.00; and it was their intention at that time, also, that plaintiff could not terminate the lease before, nor until, he executed and delivered to defendants a quitclaim deed duly acknowledged, releasing and quitclaiming to defendants the demised premises.

IV.

On or about November 5, 1956, plaintiff mailed to defendants a letter stating that plaintiff was reluctantly forced to surrender the Lease and Option, stating that the \$7,000.00 payment due November 8, 1956, would be paid when due, and stating, further, that the quitclaim deed provided for in the agreement would be sent to defendants as soon as practicable. The letter was received by defendants in due course of the mail.

V.

On or about November 6, 1956, plaintiff by and through his agent mailed to defendants a check for \$1,000.00 representing the regular monthly rental payment and a check for \$3,932.15 representing the first quarterly rental payment of \$7,000.00 less amounts claimed by plaintiff to be deductible under

the agreement as legal expense incident to clearing title to the demised premises. The amounts which plaintiff had theretofore expended for clearing title were: \$4,000.00 paid in settlement of an action to quiet title to the demised premises, and \$601.77 paid on account of attorney's fees and costs in the quiet title action.

VI.

On or about November 16, 1956, defendant Mr. Albert telephoned plaintiff in San Francisco requesting copies of the logs of the five holes drilled by plaintiff on the leased premises. In that conversation Mr. Albert expressed dissatisfaction over the remittance made by plaintiff on or about November 6th, stating that he believed defendants had been underpaid. At that time, plaintiff agreed to send the drilling logs as requested and explained that the adjustment of the difference between the parties as to money matters would be placed in the hands of plaintiff's attorneys. Plaintiff promptly sent to defendants the drilling logs requested.

VII.

When defendants received plaintiff's letter of November 5, 1956 (Finding No. IV), they understood that the Lease and Option agreement required plaintiff to make the \$7,000.00 payment and to execute and deliver a quitclaim deed of the leased premises before he could terminate the agreement; and they knew that plaintiff was attempting to, and claiming the right to, terminate the Lease and Option without first making the payment and without first

delivering the quitclaim deed. At that time, and thereafter until some date subsequent to January 1, 1957, although disputing with plaintiff the amount of money due to them as accrued rentals, defendants acquiesced in the termination of the Lease and Option agreement notwithstanding plaintiff had failed to make the \$7,000.00 payment and to deliver the quitclaim deed. About November 16, 1956, defendants recognized that plaintiff's interest in the demised premises was ended and defendant Mr. Albert requested and received from plaintiff the drilling logs pertaining to the demised premises. Defendants did not at any time prior to April 16, 1957, give notice to plaintiff or make claim to him that the Lease and Option agreement was not and would not be terminated until the \$7,000.00 payment was made and the quitclaim deed delivered.

VIII.

On or about November 21, 1956, defendants, through their attorney, mailed to the plaintiff, through his attorney, a letter asserting that the payment of \$3,932.15 was not proper and that plaintiff was still indebted to the defendants on account of the first quarterly payment.

IX.

On or about November 26, 1956, plaintiff, through his attorney, responded to defendants' letter of November 21 disagreeing with the position of the defendants and stating that the defendants would be

hearing from San Francisco either direct or through the office of plaintiff's attorney.

X.

On or about January 4, 1957, plaintiff, through his agents, mailed to defendants a check in the sum of \$1,286.52 representing an additional payment on account of the first quarterly payment of \$7,000.00 accompanied by a letter stating that the remittance of \$3,932.15 which was made November 6, 1956, had been the result of an error in computation.

XI.

Neither the check for \$1,286.52 nor the check for \$3,932.15 were negotiated by the defendants until after the institution of this litigation.

XII.

On or about May 31, 1957, plaintiff, through his attorney, mailed to defendants a letter enclosing a quitclaim deed duly executed and acknowledged. Said letter and deed were received by defendants in due course of the mail. On or about May 31, plaintiff deposited the sum of \$23,000.00 in escrow in the Tucson Downtown Office of the Valley National Bank of Phoenix pursuant to the provisions of paragraph 14 of the Lease and Option agreement.

XIII.

At no time prior to May 31, 1957, did the plaintiff deliver or tender a quitclaim deed to the premises to the defendants.

XIV.

The total amount paid by plaintiff to defendants under the Lease and Option agreement and on account of the quarterly payment of \$7,000.00 due November 8, 1956, is the sum of \$5,218.67.

XV.

The failure to deliver the quitclaim deed to the defendants promptly after November 6, 1956, was occasioned by the oversight of John W. Hamilton, secretary of Homestake Mining Company, or of some other officer or agent of the Homestake Mining Company, and the said John W. Hamilton or such other officer or agent of the Homestake Mining Company in such oversight, were acting as the agents of the plaintiff within the scope of their authority.

XVI.

The failure to make proper remittance in connection with the \$7,000.00 quarterly payment was occasioned by a dispute between the parties as to what portion of said payment was properly offset by expenditures made by plaintiff in clearing title to the demised premises and as to the proper proration period of such expenditures.

Conclusions of Law

I.

This Court has jurisdiction of the parties and of the subject matter of this action.

II.

The payment of the first quarterly payment of \$7,000.00 was a condition precedent to the exercise by the plaintiff of his option to terminate the contract.

III.

The sum of \$4,000.00 paid on behalf of the plaintiff to compromise the quiet title action was not a legal expense within the meaning of the contract.

IV.

The execution, acknowledgment, and delivery to the defendants of a quitclaim deed, releasing the property described in the contract to the defendants, was a condition precedent to the exercise by the plaintiff of his option to terminate the contract.

V.

Defendants waived performance by plaintiff of the conditions precedent to plaintiff's right to terminate (being the conditions described in Conclusions of Law I and III) and the Lease and Option agreement was terminated upon such waiver and on or about November 16, 1956.

VI.

Notwithstanding the termination of the Lease and Option, plaintiff was bound to pay the \$7,000.00 quarterly payment which fell due on November 8, 1956, and deliver the quitclaim deed to the demised premises.

VII.

A quitclaim deed satisfying the requirements of the Lease and Option agreement was delivered to and accepted by defendants on or about May 31, 1957.

VIII.

Following the payments of \$3,932.15 and \$1,286.52 made by plaintiff to defendants on November 6, 1956, and January 4, 1957, respectively, there remained due from plaintiff to defendants on account of the first quarterly \$7,000.00 payment, a balance of \$1,330.00.

IX.

Defendants are entitled to judgment against plaintiff on Count 1 of their Amended Counterclaim in the following amounts:

(a) Interest at the rate of 6% per annum on the sum of \$2,616.52 from November 8, 1956, to January 8, 1957.

(b) The sum of \$1,330.00, together with interest thereon at the rate of 6% per annum from January 8, 1957, until paid.

X.

Defendants are entitled to recover their costs of suit from plaintiff.

Dated: June 10, 1958.

/s/ JAMES A. WALSH,

United States District Judge.

[Endorsed]: Filed June 10, 1958.

In the District Court of the United States
for the District of Arizona

Civil Action No. 964—Tucson

IRA B. JORALEMON,

Plaintiff,

vs.

H. GREENWAY ALBERT and MAJA GREEN-
WAY ALBERT, Husband and Wife,

Defendants.

JUDGMENT

The above-entitled action having regularly come on for hearing before the Court without a jury on February 21, 1958, the plaintiff appearing by his attorneys, Boyle, Bilby, Thompson & Shoenhair, and the defendants appearing by their attorneys, McCarty, Chandler & Udall, and each of the parties having introduced evidence both oral and documentary, the matter having been argued and submitted to the Court for decision, and the Court having heretofore on June 10, 1958, lodged its Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. This court has jurisdiction of the parties and of the subject matter of this action.

2. The lease and option between the parties, referred to in plaintiff's complaint, was terminated prior to December, 1956.

3. Judgment in favor of the defendants and against the plaintiff on Count I of defendants' amended counterclaim is hereby awarded in the following amounts:

(a) Interest at the rate of 6% per annum on the sum of \$2,616.52 from November 8, 1956, to January 8, 1957.

(b) The sum of \$1,330.00, together with interest thereon at the rate of 6% per annum from January 8, 1957, until paid.

(c) Defendants' costs incurred in this action in the amount of \$58.00.

4. Plaintiff is entitled to all funds held in escrow at the downtown office of The Valley National Bank of Phoenix, a national banking association, at Tucson, Arizona, under the escrow alleged in plaintiff's complaint after the amount of said judgment in favor of defendants has been paid into court.

5. Defendants have no rights against the plaintiff under said lease and option except as set forth in paragraph 3 above.

6. The Clerk of this Court is hereby ordered to issue an order authorizing The Valley National Bank of Phoenix to release and deliver to Boyle, Bilby, Thompson & Shoenhair, attorneys for plaintiff, all funds remaining in said escrow at such time as a sum equal to the aggregate amount of the judgment rendered in favor of defendants in paragraph 3 above has been deposited with said Clerk.

Done in Open Court this 18th day of June, 1958.

/s/ JAMES A. WALSH,

United States District Judge.

The foregoing Judgment approved as to form
this 18th day of June, 1958.

McCARTY, CHANDLER &
UDALL,

By /s/ D. B. UDALL,

Attorneys for Defendants.

[Endorsed]: Filed June 18, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that H. Greenway Albert
and Maja Greenway Albert, Defendants above
named, hereby appeal to the United States Court
of Appeals for the Ninth Circuit from the final
Judgment entered in this action on the 18th day
of June, 1958.

Dated this 18th day of July, 1958.

McCARTY, CHANDLER &
UDALL,

By /s/ CHARLES D. McCARTY,

Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed July 18, 1958.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents:

That the undersigned, The Fidelity and Casualty Company of New York, a corporation of the state of New York, duly licensed to transact a general surety business in the state of Arizona, is held and firmly bound unto the above-named Plaintiff in the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars.

The condition of this obligation is such:

That Whereas the above-named Defendants have appealed to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in the above matter on the 18th day of June, 1958.

Now, Therefore, if the said Defendants shall pay the costs of the Plaintiff if the appeal is dismissed or the Judgment affirmed, or shall pay such costs as the Appellate Court may award if the Judgment is modified, this obligation shall be null and void, otherwise to remain in full force and effect.

Dated this 18th day of July, 1958.

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK,

[Seal] By /s/ TRACY BIRD,
Attorney.

[Endorsed]: Filed July 18, 1958.

In the United States District Court
for the District of Arizona

Civ. 964—Tucson

IRA B. JORALEMON,

Plaintiff,

vs.

H. GREENWAY ALBERT, et ux.,

Defendant.

PRETRIAL CONFERENCE

Appearances:

For the Plaintiff:

MESSRS. BOYLE, BILBY, THOMP-
SON & SHOENHAIR, by
MR. WILBERT E. DOLPH, JR.

For the Defendant:

MESSRS. McCARTY, CHANDLER &
UDALL, by
CHARLES D. McCARTY.

The Above-Entitled Matter came up for pretrial hearing on the 4th day of October, 1957, before the Honorable James A. Walsh, Judge, and the following proceedings were had, to wit:

Mr. McCarty: I can generally go over the problem. Mr. Joralemon came to town for his deposition on Monday of this week or was it Tuesday?

Mr. Dolph: It was Tuesday.

Mr. McCarty: I asked him to show and so he

came to town on Tuesday. In the contract that was prepared by them there was a provision in there, and I will see if I can find it in this draft of the contract.

Mr. Dolph: Well, tell him generally what it is.

Mr. McCarty: It provided that they intend to do certain exploration on these claims that are owned by the defendant. They envisioned drilling on the property and the provision was made in the contract that no casing would be pulled until they had paid to the defendant five thousand dollars. Monday evening of this week—my client went out there over the week end and he came to me with the information that there was something irregular about the casing out there, and on Tuesday, Mr. Joralemon informed me that without their knowledge the contractor which they had employed to drill the holes had pulled some casing and substituted pipe. Now, I learned that on Tuesday evening of this week. From Mr. Joralemon, I heard it for the first time. I heard that something was irregular on Monday evening from my client. I have made agreements to employ an engineer to go out and see if he can—I don't know anything about what you can determine, I haven't any idea of what it does to a drill hole and to pull the casing and substitute pipe, but I do know that our rights in that regard—I don't know what to do about it, but there are two witnesses here and that is why I took it up with them when they were here Tuesday. Mr. Joralemon was here and Mr. [3*] Lipscomb was

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

here, and I told them until I knew or had reasonable knowledge of what had been done out there that I might be in a position of suggesting to the Court that we continue the trial date on it.

Mr. Dolph: Now, may I be heard on this particular thing? First of all, I think Charlie raised the question or there is a provision in the contract relating to casing being left in the hole. I don't believe it reads exactly the way he stated and we don't have the contract here, and we believe there wasn't even a technical violation, but we can argue that later. The point we make is this, that we learned of it after Charlie heard of it, actually, and we do not want a continuance. We do not think it is a type of thing that a continuance should be granted on and the defendant himself has had an opportunity to go out there and inspect these premises a long time ago and his deposition will show that he realized that we weren't going to continue on this thing and he knew we had abandoned the property and we don't feel it is fair to us. We had made agreements to get these people down when the trial had been set. We have got money on deposit in escrow and it is tied up pending the outcome of this lawsuit. We feel that it is unfair to require us to postpone this thing and continue just because the defendant himself has maybe slipped on his rights. Besides, we don't think it requires any additional time to prepare. Anything that they want to prepare in the way of evidence we think can be adequately done between now and the time for the trial to start. The engineer or the driller who did

the drilling has all the facts available and is here in town and he is available to Mr. McCarty the same as he is to us. We feel that if we are prepared to go on that issue then he certainly is, too. [4]

Mr. McCarty: Lest there be any doubt, the contract provided that no casings will be pulled until they pay him twenty-five thousand dollars, is that right?

Mr. Dolph: I don't believe that is the wording of the contract. There is an issue on when that casing should be pulled out.

Mr. McCarty: What do you think is in the contract?

Mr. Dolph: It doesn't matter what I think. The contract will speak for itself. I am just telling you right now that we are going to contend that there wasn't any violation of the contract because there was pipe substituted for a portion of the casing.

Mr. McCarty: The casing was pulled, there is no doubt about that.

Mr. Dolph: There is some casing pulled out. There is some casing in the bottom of each hole.

Mr. McCarty: In other words, you don't expect people to do something that they are bound by contract to do. Their contract was that no casing would be pulled and it was by accident that I found out about it and I found out about it when my client took somebody out there to show him the claims and noticed the irregularity in the drill hole and called it to my attention on Monday.

Mr. Dolph: Your client was out there in March, or at least was trying to sell the claim in March of

this year, and according to his testimony he found it out merely by going up to the hole and shaking the pipe. It was apparent if he went out there. We didn't know about it either. The driller did it.

Mr. McCarty: Be that as it may, I don't know that he is violating [5] the duty when he assumes that people have obeyed the word of the contract that he signed. I am telling the Court when I found out about it and I know when you found out about it, because you found out at the very time we did or before.

Mr. Dolph: I found out about it the day of the deposition.

Mr. McCarty: My client came in and said, "That casing they left out there is"——

The Court: Of course, as far as when he should or shouldn't, that wouldn't enter into it as long as it wasn't barred by limitations.

Mr. Dolph: We don't object to his amending.

Mr. McCarty: It is justified in this matter.

The Court: That is what I am getting at. If you amended your counterclaim to include that and we separate those issues——

Mr. McCarty: That would be all right with me.

The Court: Is that agreeable with you, Bill?

Mr. Dolph: We would prefer to try them all the 10th, but if you insist, we would rather get this one issue determined now.

The Court: I am just assuming that Charlie would come in here with a formal motion and set up and verify the things that he has told me here, that he didn't discover this until very recently and

he doesn't want to be cut out of it. Now, if that could be agreed upon, you could amend your counterclaim and you could—that part of the case would be separately tried and we would go ahead with what we have got and then you could answer the second amended counterclaim and we could try that another day.

Mr. Dolph: I do not want to be in the position of consenting to [6] that, your Honor. I think that is within the Court's discretion. Our clients, I am sure, would prefer the whole thing be tried at once because they are going to be down there for the trial, but if it comes to an alternative between what you suggest and continuing the whole trial, we certainly want to try our lawsuit on the date that it has been set.

The Court: I would only say this, Bill, that assuming I granted a continuance, but assuming that Mr. McCarty had presented a motion supported by evidence that set out that and there was nothing to the contrary appearing—in other words, I would undoubtedly grant the continuance rather than have him lose the cause of action.

Mr. Dolph: Well, your Honor, would he lose the cause of action if you granted him leave to appeal?

The Court: Well, he tells me that he can't, says he is not prepared to try that because he doesn't really know what evidence he would have or can get as to it.

Mr. Dolph: Whether he has been damaged and, if so, how much?

Mr. McCarty: Now, how do I find out if there is a drill casing five hundred feet under the ground?

Mr. Dolph: You have got the same man available that we have.

Mr. McCarty: I will find him.

Mr. Dolph: He has been instructed by our people to disclose any information you want, Mr. Dodge.

Mr. McCarty: I will talk to him. There were two drillers, though, you remember.

Mr. Dolph: They were partners. [7]

Mr. McCarty: No; there were two drilling companies.

Mr. Dolph: I am not aware of that.

Mr. McCarty: That is perfectly satisfactory with me. As far as being prepared on this case, I am as prepared now as I will ever be, but you can appreciate the position I am in if on Monday of this week I find out that a very substantial right of my clients arises that involves this case. Do you want me to file an affidavit or I can make a motion here in open court for leave to amend my client's claim to allege a breach of contract with respect to pulling the casing and the Court may order a separate trial on that count of the counterclaim which may not come to trial if my discovery indicates that I don't have a counterclaim. But at least I ought to be able to—how about that procedure?

Mr. Dolph: You are moving?

Mr. McCarty: Well, I believe it is proper to move at this time and I now move the Court for leave to amend my counterclaim to insert a counter-

claim alleging that they—and I indicate my consent to the Court ordering that count of the counterclaim separate for trial.

Mr. Dolph: Well, I do not object to the amendment to the counterclaim, your Honor, but do object to the severance from trial. I haven't discussed that with my client. It is possible that I could consent to that if I had such an opportunity. I am not opposing this on the grounds there has been no affidavit, which I think Mr. McCarty's statements can take the place of.

The Court: In other words, you are not making any resistance on the basis that it is not done [8] formally?

Mr. Dolph: No.

The Court: Well, I will grant the motion for leave to file an amended counterclaim setting up the additional count and relying upon counsel's statement, which incidentally is not questioned as to when discovered by counsel and his client.

Mr. Dolph: By counsel, no. I would dispute them when the client discovered it but that is neither here nor there.

Mr. McCarty: Let me ease your mind, Mr. Dolph. Mr. Albert Tully came to my office Monday morning to inform me of the fact.

Mr. Dolph: I said I don't dispute when counsel discovered it. I am not arguing with you on that.

The Court: On the basis of that, because I feel that that would hardly give counsel adequate time to prepare his claim on it, I guess in the first place he doesn't know whether he has been damaged and

in the second place doesn't know how much, and while he can get the engineer or the driller that you mentioned, even then I don't know that he would be required to take that driller's word as to what is down there after he hears from him. I don't know that I could or you could, Mr. Dolph, or anybody else could say that they were ready to go to trial on a matter of that kind, so on that basis I will separate the issues made by the second count of the counterclaim and we will try that at another time.

Mr. Dolph: Your Honor, will you leave that open so that I will have an opportunity to contact my client to see whether they prefer to go ahead under those circumstances, whether they would prefer to go to trial on the present issues separately from those which will be raised by the [9] amendment or whether they would want to have the whole thing go over.

The Court: I will say right now that in the event they should decide to try the whole thing at once, I will unhesitatingly continue it.

Mr. McCarty: I would certainly have no objection on that regard.

The Court: I am putting you to two trials in view of the circumstances of the counterclaim here and if you wanted to insist on it, I couldn't require you to try it twice.

Mr. McCarty: Could counsel indicate when you might be able to give your preference in that regard?

Mr. Dolph: It will be the first of the week I

believe before I can contact the people. They are all over the country.

The Court: What have we got in the way of exhibits that could be——

Mr. McCarty: Almost every exhibit which I have, your Honor, was identified and attached to the deposition of Mr. Joralemon and Mr. Driscoll, which were taken by Mr. Baker Tuesday afternoon.

The Court: It hasn't been filed yet so I haven't got those. Did you stipulate as to those in the deposition that they might go into evidence, or was——

Mr. Dolph: No; I don't believe we had such a stipulation and offhand there are numerous documents, correspondence and so forth and so on. I don't think we will have much difficulty on that score. The foundation on all of them had been laid, hadn't it, Charlie?

Mr. McCarty: I don't believe we have anything up there that isn't evidence and will be readily apparent to counsel that it is evidence. In other words, I certainly wouldn't object to any of the letters or documents [10] you provided.

Mr. Dolph: I don't think there would be general use to us to make a blanket stipulation to them.

Mr. McCarty: I will tell the Court that I anticipate very little trouble in regard to the exhibits that are now with the deposition.

The Court: Do you have any, Mr. Dolph, that you didn't——

Mr. Dolph: Not that I can think of, your Honor. Our documents are almost identical to those that Mr. McCarty put in, either the originals or the

copies. We certainly are not going to object that they are the copies rather than the originals and I am sure that he won't on the ones that we put into the deposition and I think what is in there will pretty well cover what we are going to introduce at the trial.

The Court: Well, is there anything further that we could do at this hearing?

Mr. McCarty: I could introduce some vouchers here that might facilitate these, that might be evidence and that I might want in for that purpose.

Mr. Dolph: Isn't this one of the documents in the deposition? I believe it is. I think that is one that a copy of was put in with a registered return on it.

Mr. McCarty: Do you have any objection to the introduction in evidence?

Mr. Dolph: Well, I haven't studied it thoroughly. Mr. Driscoll, I believe, wrote it. It is on his letterhead.

The Court: This antedates the agreement? [11]

Mr. McCarty: Yes.

The Court: Well, isn't the agreement the thing that your rights are determined by, rather than——

Mr. McCarty: Right. The agreement provided that they agree to pay legal expenses and court costs. The lawsuit was settled for four thousand. They paid Mr. Connor his fee and costs and the question is whether the four thousand which was paid in settlement was legal expenses and court costs. That is one of the major issues in this case.

The Court: That is in the agreement, isn't it, that provision?

Mr. McCarty: Legal expenses and court costs. And of the question of interpretation as to what the parties intended that to be.

The Court: That is an issue that may or may not come up, legal expenses and court costs. Who is contending that that term is ambiguous?

Mr. McCarty: I claim that it is unequivocal as the devil.

Mr. Dolph: We both do, as usual in those interpretive things, your Honor. They claim that the term legal expenses, I don't believe court costs is included there, legal expenses. They claim it does not cover them when settlement was made and we claim that it does.

The Court: You claim that it is not an ambiguous thing?

Mr. Dolph: That's right.

Mr. McCarty: In the light of that, if the Court should decide in the light of those that it is ambiguous and should go into instructions—I will have the letter with me.

The Court: Well, we can mark them one at a time.

Mr. McCarty: There is no objection as to the function, is that [12] right?

Mr. Dolph: Not on your avowal that it was received from Driscoll.

The Court: It may be stipulated then that what I have just marked in pencil and have circled will

be put in the file, and may be offered at the trial and subject to an objection as to being received.

Mr. Dolph: Let me be a little more specific, if I may. I would like to reserve all objections except the objection of failure to lay a foundation. I haven't studied the document thoroughly. There may be some other specific objections that I would like to make at the time it is offered.

The Court: We will say that it may be received without further foundation, in evidence.

Mr. Dolph: Right.

The Court: That will probably cover everything. Have you got any more?

Mr. McCarty: I might have one or two other things here. I don't think I have got any—I am prepared, if counsel wants to, the originals of the letters that were sent to Mr. Albert, May 31st, that haven't been put into evidence, but certainly——

Mr. Dolph: To Mr.——

Mr. McCarty: To Mr. Albert from your firm.

Mr. Dolph: Well, I was going to ask you to stipulate as to all of the exhibits that are attached to the complaint. I don't believe there is any dispute under the pleading.

Mr. McCarty: Let me see—— [13]

Mr. Dolph: I think all of those except that letter you refer——

Mr. McCarty: I will stipulate that the court may receive into evidence those exhibits. I think they are all material.

The Court: A, B, C and D.

Mr. McCarty: I think they are material. Now,

about those vouchers, do you think there is any reason to put those in evidence?

Mr. Dolph: I think it would be a good idea. It gives the whole picture on it.

Mr. McCarty: Although Mr. Driscoll, the attorney and I were able to reconstruct with fair accuracy and these are voucher stubs in connection with remittances which were made to Mr. Albert, with the Homestake Mining Company, which just complete the formal picture, so I will put them in. There is the first one. The second one is missing and I don't know where it is, but Mr. Driscoll and I, when his desposition was taken, arrived at a pretty fair surmise in that regard which the court will find in evidence.

The Court: I am going to make these two.

Mr. McCarty: This is the 4th one.

The Court: Two, three and four.

Mr. McCarty: The fifth one and then a payment which is November 6th. Now, Mr. Dolph, would you like to join in a stipulation that those may go in and those are actually the voucher stubs of remittances to the defendant from Homestake Mining Company in connection with this Joralemon contract?

Dr. Dolph: Those are the ones you talked to Driscoll about?

Mr. McCarty: Exactly: [14]

Mr. Dolph: Well, yes, I will so stipulate.

The Court: It is stipulated that the vouchers which I have marked with the penciled figures, two, three, four, five, six and seven, may be received in

evidence on the offer of either party upon the trial.

Mr. McCarty: Now, here is a document that I intended to identify at the taking of the deposition, Mr. Dolph, and I don't think you will be in any position to do anything about it here because you don't know any more about it than I know about it and I know practically nothing about it. I think it is a draft that Mr. Driscoll left with Connor on April 28th when he was in Tucson and I think that is his handwriting on this. I want you to know that I have the thing and I forgot to identify it at the taking of the deposition. It might have some value at the trial, I don't know.

Mr. Dolph. Well, if you surmise correctly, I think all the witnesses as well as the attorneys were confused by those drafts at the taking of the depositions.

Mr. McCarty: I wanted you to know that I had it but I can't ask you to do anything about it because I don't know what it is.

Mr. Dolph: You think it is a copy that Driscoll provided and left with you?

Mr. McCarty: Mr. Conner, when he was down here April 28th. I think he left it with him on that date and I intended to ask him about it, but I overlooked it.

The Court: Do you have anything, Bill?

Mr. Dolph: No, sir. I don't want to be barred if I discover something. [15]

The Court: No. This is solely for the purpose of expediting matters.

Mr. Dolph: I think that Charlie went through

everything that he had. We put a few in and I believe almost everything except these vouchers was put it.

Mr. McCarty: We tried to put in everything that could be of any major materiality.

The Court: The major advantage of this is it will be in the file and if somebody wants to go over them and they will be offered and there will be no objection as to lack of foundation and you can argue it and pass on it that way.

Mr. McCarty: As to the Court's query with respect to counsel's contract agreement being ambiguous, I don't have it here before me, but it reads legal expenses and court costs.

Mr. Dolph: I believe you will find it is just legal expenses.

Mr. McCarty: You might be right.

Mr. Dolph. I don't think it refers to court costs, maybe I am wrong.

Mr. McCarty: We will have it here.

Mr. Dolph: That is just a matter of memory. Wait a minute, I think that is quoted in the complaint, that part of it.

Mr. McCarty: Do you have any offers to make me in this case, Mr. Dolph?

Mr. Dolph: I am willing to entertain an offer of settlement. I will submit it. We can discuss that on the way up to my office if you [16] would like.

Mr. McCarty: Any real legal expense to the foregoing shall be deducted, that is what it says. Now, with respect to the leave of Court that the Court has given me to file an amended counter

claim, would Tuesday of next week be soon enough for that?

The Court: Sure, we are not going to try it anyway.

Mr. Dolph: Well, if I may interject this, I would like to know what the amendment is going to be when I call these people, if possible.

Mr. McCarty: I intend to amend and allege a breach of contract with respect to their putting in a well casing and request damages of twenty-five thousand dollars or an alternative of twenty-five thousand dollars less whatever recovery I may get in this case.

The Court: In other words, they would have a right to take it if they gave you twenty-five thousand dollars?

Mr. McCarty: What I intend to do is allege a breach of that contract and parley along those lines.

Mr. Dolph: All right. Just a breach of contract and it is limited to the matter arising from the removal of casing?

Mr. McCarty: Oh, yes.

The Court: You are going to discuss settlement or you are not.

Mr. McCarty: I don't believe it is possible to settle the case, I honestly don't.

The Court: Why do you say that?

Mr. McCarty: It is a very unusual case.

The Court: I was going to say every case is unusual. Every contract [17] case is very unusual.

Mr. McCarty: Are you at all familiar with this case?

The Court: Yes, I read it.

Mr. McCarty: Well, on December 5th they gave a notice to Mr. Albert of their intention to quit the premises and we will send you a quit claim deed when it is practicable, and I don't think your Honor read the provision of the contract which they did not quote.

The Court: I know that you in your answer said they had left it out.

Mr. McCarty: Well, the paragraph three of it says that they would surrender the property, as quoted in here. Well, the notice of November 5th was given to us in which he said, "I am going to give the place up and a quit claim deed will be provided and forwarded to you as soon as practicable." That was November 5th. November 6th came that check out of the San Francisco office for \$3,832.15. Now, the agreement provided that there can be no cancellation under paragraph three until the first quarterly payment of \$7,000.00 had been made. They weren't to have the cancellation until they had paid the first quarterly payment of \$7,000.00. Well, when they got that check they demurred as to the amount and later in the month Charlie Conner wrote to them and said, "we think you are wrong." And we didn't hear anything from that time until about the third of January we got that supplemental check and they said, "we are sorry we computed what we owed you wrong and here is the balance." Well, we continued along until in April, Mr. Albert had Mr. Conner write and say, "why don't you send me my rent?" Then we got Mr. Bilby's letter of May 31st

in which they forwarded to us a [18] quit claim deed.

The Court: What about thirteen?

Mr. Dolph: That is a very good question.

The Court: That was the thing that registered with me when you registered it.

Mr. McCarty: That registered with me also. With respect to the notice, now, here again it is a tough question. You see the notice of November 5th, here is what it says: "I am surrendering the lease. The \$7,000.00 payment will be paid when due and the quit claim deed will be sent to you." That was never done until May 31st of this year.

The Court: Thirteen says that he can give up all or part and then if he does and they want it he will give them a quit claim deed, but until they give it all up they are obligated to pay on it.

Mr. McCarty: That is correct and furthermore, they didn't have the right to cancel until they had made that \$7,000.00 payment.

Mr. Dolph: I don't think we want to argue our case here. I think you are getting in a few more licks than I am.

The Court: What I am looking at is what might happen.

Mr. McCarty: That is why I say it is an enormously difficult question. What has really fouled up the works with respect to trying to settle this case is the fact this other has come up.

The Court: The pipe deal?

Mr. McCarty: Yes.

The Court: I am just thinking out loud now.

You haven't offered me anything, but if you care to, we will consider it and I think that the [19] big issue is this twenty-five thousand dollars. I don't think there is much to argue about on this and I think you will agree that once you have had a chance to talk to the drillman, but be that as it may——

Mr. McCarty: I have talked to the drillman after I talked to the mining engineer I have hired to go down there. [20]

* * *

State of Arizona,
County of Pima—ss.

I, Judy Smith, stenotypist, do hereby certify that I have transcribed to the best of my ability the stenographic notes made by Jimmy R. Galloway, a duly qualified court reporter, on the date indicated, in the above-entitled action, and that the foregoing 20 typewritten pages represent a complete transcript of said notes.

Dated this 12th day of October, 1958.

/s/ JUDY L. SMITH.

[Endorsed]: Filed October 13, 1958.

In the United States District Court
for the District of Arizona

No. Civil 964—Tucson

IRA B. JORALEMON,

Plaintiff,

vs.

H. GREENWAY ALBERT and MAJA GREEN-
WAY ALBERT, Husband and Wife,

Defendants.

PROCEEDINGS

Appearances:

MESSRS. BOYLE, BILBY, THOMPSON
& SHOENHAIR, By

MR. RALPH W. BILBY and

MR. WILBERT E. DOLPH, JR.,

For the Plaintiff.

MESSRS. McCARTY, CHANDLER &
UDALL, By

MR. CHARLES McCARTY, and

MESSRS. GATEWOOD & GREENWAY, By

MR. CHARLES C. GATEWOOD,

For the Defendants.

The Above-Entitled Matter came up for trial on the 21st day of February, 1958, at the hour of 10:00 o'clock a.m., at Tucson, Arizona, before The Honorable James A. Walsh, Judge, and the following proceedings were had, to wit:

Mr. McCarty: I wonder if the record could show the association of Mr. Charles Gatewood as attorney for the plaintiff in the case?

The Court: The record may so show. Are you gentlemen ready?

Mr. Dolph: Plaintiff is ready, your Honor.

Mr. McCarty: Defendants are ready, your Honor.

The Court: You may proceed.

Mr. Dolph: Before we get into the merits of the case, your Honor, there are a couple of preliminary matters I think we can take care of by stipulation. Number one, Mr. McCarty has agreed that Count Two of his amended counterclaim can be stricken.

Mr. McCarty: That is the agreement, your Honor. I told Mr. Dolph it would not be necessary for him to prepare a defense to it and the fact upon which it was based proved to be incorrect.

The Court: Very well. There will be an order on stipulation of counsel striking Count Two of the amended counterclaim.

Mr. Dolph: Mr. McCarty, we can save a lot of time if we stipulate to the facts you admit in your pleadings. Are you willing to do that?

Mr. McCarty: You tell me the facts you want me to stipulate to, Mr. Dolph, and I will be glad to state my position. [6*]

Mr. Dolph: The allegations contained in paragraphs one and two of our complaint and the allegations contained in paragraph three of our

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

complaint, and the allegations contained in paragraph four of our complaint, except as limited in paragraph three of your answer.

Mr. McCarty: The complaint does not state a claim upon which relief can be granted. The Court is without jurisdiction in the premises, and I think we had better cure that by stipulation right now. The Court has no jurisdiction under paragraph one.

Mr. Dolph: Do you have a motion to present?

Mr. McCarty: No, I don't have a motion to present. I am calling the Court's attention to the fact he has no jurisdiction in the case.

Mr. Dolph: There is diversity of citizenship.

Mr. McCarty: It is not alleged.

The Court: There is no allegation it is a citizenship, is what Mr. McCarty is referring to.

Mr. Dolph: I will move at this time to amend the allegations of paragraph one to read: That plaintiff is a resident and citizen of San Francisco, California, and that the defendants are each residents and citizens of the State of Arizona.

Mr. McCarty: I have no objection to the amendment as presented, your Honor, and at this time I will admit for the record the truth of those allegations.

The Court: If I may borrow your pen, Miss Clerk, I will interline the amendment.

Mr. McCarty: I have admitted paragraphs two and three in my answer.

Mr. Dolph: Yes.

Mr. McCarty: I continue to admit them.

Mr. Dolph: In paragraph three you admit, ex-

cept there are other allegations, which is not a denial.

Mr. McCarty: I stated already that I admitted three, Mr. Dolph.

Mr. Dolph: And the allegations contained in paragraph three, the express admissions contained in paragraph three of your answer.

As to the institution and settlement of a quiet title action and payment of the sum of \$601.77.

Mr. McCarty: I admit that.

Mr. Dolph: As attorneys' fees and costs and payment of \$4,000 in settlement of the claim by the plaintiff.

Mr. McCarty: All that has been admitted.

Mr. Dolph: And those were done with the consent and approval of the defendants?

Mr. McCarty: Right.

Mr. Dolph: Then you have admitted the allegations of paragraphs five and six? [8]

Mr. McCarty: Yes, sir. One other point that I wanted to make clear—I think the pleadings makes it clear—your request I admit that that was done with the approval, that payment of the \$4,000, with the approval of the defendants, that is the qualified approval along the lines set forth in my paragraph three.

Mr. Dolph: If this is to be limited to a stipulation, you will not stipulate that it was done with approval and consent without any condition?

Mr. McCarty: No, I will insist upon the condition stated in my pleadings, the approval was a qualified approval.

Mr. Dolph: We will stipulate on that. We will go ahead with our proof on that item. You do stipulate those amounts were paid and the lawsuit was instituted on the defect of title referred to in paragraph seven of the lease and option?

Mr. McCarty: I don't know the paragraph; I will certainly stipulate that the lawsuit was instituted, the quiet title action was instituted, that the attorneys' fees in the amount you stated were paid, that the lawsuit was settled on the payment of the amount of \$4,000 and that amount was actually paid, yes.

Mr. Dolph: By the plaintiff?

Mr. McCarty: By the plaintiff or by Homestake Mining Company, if you want to be real accurate about it. [9]

Mr. Dolph: On behalf of the plaintiff.

Mr. McCarty: All right.

Mr. Dolph: The allegations of paragraph five you admit; in that connection I think we should call the Court's attention to a minor discrepancy as to the amount paid after November 5th, 1956. There is an error in my allegation, the second part of the complaint, and I ask to amend that to read: Subsequent to November 5th, 1956, the plaintiff paid to defendants the sum of \$6,218.67. I believe your vouchers——

Mr. McCarty: Subsequent to what date?

Mr. Dolph: November 5th.

Mr. McCarty: And they paid what amount?

Mr. Dolph: \$6,218.67.

Mr. McCarty: I don't arrive at that result. My

mathematics is bad. I have no objection to that amendment. For clarity in the matter I think it might be well to point out to the Court that the sum of \$5,218.67 was paid on account of the requirement of the contract requiring payment of the \$7,000 payment. In addition there was a regular monthly payment of \$1,000, making a total of \$6,218.67.

Mr. Dolph: I think that is substantially correct. In other words, the \$5,218.67 was paid in connection with the quarterly payment.

Mr. McCarty: The \$7,000 payment referred to in the contract.

Mr. Dolph: Right. Can we so stipulate?

Mr. McCarty: I do so stipulate.

Mr. Dolph: You admit the allegations of paragraph six of our complaint. Can that amendment be granted, your Honor, on stipulation?

The Court: Yes, and I have made it by interlineation.

Mr. McCarty: In connection with my admission of your paragraph six, I will admit that the letter was mailed and I will admit that the letter was received shortly after the date it was mailed. I am without knowledge or information sufficient to form a belief as to whether or not it was either registered or certified. I believe it was neither.

Mr. Dolph: We can stipulate to what you say you will admit.

Mr. McCarty: I will admit the letter was mailed on that date and was received in due course of the mail shortly thereafter.

Mr. Dolph: All right. You admit the allegations contained in paragraphs ten and eleven of our complaint; are you willing to stipulate to those facts?

Mr. McCarty: I, of course, don't know it to be the fact you deposited \$23,000 over there.

Mr. Dolph: I will avow to that.

Mr. McCarty: I will admit you did then. I assumed you had when you said you had, that is why I admitted it, and I now admit it. And the facts contained in paragraph eleven.

Mr. Dolph: Ten and eleven.

Mr. McCarty: Yes, they are admitted.

Mr. Dolph: I would like to call Mr. Joralemon.

Mr. McCarty: Just one moment. I believe I would like to make an opening statement. I believe it will be of some assistance to the Court if we try to cull out now what the issues are in the case, what the proof is going to be and what I take to be the legal questions involved. I think it will greatly facilitate the presentation of the matter.

The Court: For orderly purpose and orderly procedure, do you desire to make a statement, Mr. Dolph?

Mr. Dolph: I hadn't intended to, but it is perfectly all right with me if you feel it will facilitate matters, we will be happy to tell you what our position is.

The Court: I think it probably would be in this instance.

Mr. Dolph: All right. We propose to prove to the Court that the plaintiff and defendants entered

into three agreements from time to time covering the same mining claims, which are the subject of this lawsuit, one of the agreements being dated March 21st, 1956, a supplement to that on May 16, 1956, and a final agreement, the one referred to in our complaint, during September, the latter part of September, 1956. That all of the payments called for under either and all of these agreements were made up to and including November 5th of 1956. That prior to that end prior to the execution of this final agreement, there was a quiet title action instituted by Mr. Conner to quiet title to the mining claims that are covered by those agreements and which are the defects referred to in the agreement, which are acknowledged as being there and which are taken account of in the agreement. The defendants in that lawsuit were a Mr. and Mrs. White and Uranium Corporation of America. That Mr. Conner did institute the lawsuit in the names of the Alberts, that his attorney's fees and court costs were paid for by Mr. Joralemon or on his behalf; that the lawsuit was settled and a quitclaim deed or release obtained from the defendants in that quiet title action, dated September 5th of 1956. That thereafter, in accordance with the contract, the plaintiff did pay to the Alberts the sum of \$1,000 a month to and including November 6th of 1956. That in connection with the quarterly payment which is referred to in the agreement, which is called for to be made on or before November 8th of 1956, in the amount of \$7,000, that the agreement

provided that the plaintiff was entitled to deduct from that payment a proportionate amount of the legal expenses, as the term is used in the contract, in connection with this quiet title action. That the plaintiff did deduct what he construed to be legal expenses, including the \$4,000 which was paid in settlement of the lawsuit, and that a check in the amount of \$3,932.15 was sent to the defendants on November 6th as payment of that. Subsequent to that the items were recomputed and the fractions used were determined to be wrong by the plaintiff's bookkeepers and an additional check in the amount of \$1,286.52 was sent to the defendants on December 31st of 1956, making a total of \$5,218.67 paid under that \$7,000 provision.

We propose to prove that on or about—it has been stipulated, as a matter of fact, that Mr. Joralemon mailed to Mrs. Albert a letter on November 5th, which will be marked in evidence, stating that he was not able to discover anything that warranted him to go further and that he had to reluctantly withdraw from the lease and option, that he would send the payments required under the contract and that the quitclaim deeds to the mining claims would be forthcoming as soon as practicable. That during the time Mr. Joralemon was in the mining claims he did extensive exploration work to the tune of approximately \$13,000, drilled five holes, and that on November 5th or immediately prior to that date he did withdraw from the mining property and never has returned to it. That Mr. Albert never at anytime, himself

or his wife nor any agent of theirs, made any demand or request upon the plaintiff for a quitclaim deed or release to these mining claims until April 16th of 1957, at which time he had his attorney, Mr. Conner, write to them advising them that the Alberts took the position that the lease and option had not been terminated and the rentals required thereunder had been accumulating all that time. That in the interim there had been telephone conversations between Mr. Albert and Mr. Joralemon and there had been correspondence from Mr. Conner to Mr. Joralemon, that at none of these times was it ever indicated to Mr. Joralemon or to any agent of his that the Alberts took the position that the lease had not been terminated. The indication being at that time that the only dispute between the parties was how much should have been deducted properly from the \$7,000 payment required to be made on November 8th. We expect to prove to you that had Mr. Joralemon had any such indication that he would have immediately furnished anything that the defendants had requested to enable them to clear their title of any claim he had under this lease and option agreement.

That is our case, your Honor.

Mr. McCarty: Your Honor, I believe that the case will boil down to two or three very simple legal issues and I would like to make a brief opening statement of the facts as I think they will bear on the only legal issues I can find in the case. Will it be all right if I jot down a few dates on the

blackboard, your Honor, to help my thinking on these things?

After some preliminary negotiations Mr. Joralemon came [15] to Tucson, Arizona, and on March 21, 1956, a penciled suggested terms of option were drawn between Mr. Joralemon on the one hand and the Alberts on the other and was signed by the parties, suggested terms of option.

The Court: Pardon me, Mr. McCarty. Is there any objection to counsel using the blackboard?

Mr. Dolph: No, your Honor.

The Court: The reason I asked, we have had trouble with that in personal injury cases, some people want to use it in opening statements to the jury and I usually rule against it, but I don't want someone to say hereafter: Well, you permitted heretofore—by stipulation, of course——

Mr. Bilby: Whatever suits your Honor's convenience.

The Court: It is all right with me, but I don't want to be misunderstood on it in the next personal injury case.

Mr. Dolph: We will stipulate, your Honor.

The Court: All right.

Mr. McCarty: On the same day that that was done, Mr. Joralemon contacted his lawyers in Tucson, Arizona, to the end that they start to work on the title to the property. Mr. Bilby's firm was contacted on that day to start the work on the title situation, and in a matter of a few days it became apparent there was a substantial cloud on the title by virtue of the claims of what we will call the

Uranium Company, it was a Utah outfit, Uranium Corporation of America, had a prior lease bond that was a substantial cloud on the title. That became apparent shortly after this was done, or about that same time. So there began a series of correspondence about how was the title to the land, and so forth, but the upshot of the whole thing was that Mr. Driscoll, who is a member of the firm—to help the Court, I will first point out that this deal was made on the following basis: Mr. Joralemon is a consulting mining engineer who has many clients. He knew about the property and it is his business to interest his clients in the property and he interested a company known as Homestake Mining Company in the property and they entered into it on a deal whereby ten per cent of the deal belonged to Mr. Joralemon, ninety per cent of the deal belonged to Homestake Mining Company. That Mining Company maintains a firm of attorneys, who I understand to be their general counsel, in Lead, South Dakota, and Mr. Driscoll is a member of that firm. At any rate, Mr. Driscoll came to Tucson, Arizona, April 28 of 1956, and he had discussions with Mr. Conner, who was Mr. Albert's attorney at that time, with reference to the deal, the cloud on the title and so forth. He presented Mr. Conner with a long formal contract on that date, telling him, "I want you to look this over and tell me what you think about it." And then he, Mr. Driscoll, went back to his hotel room that Saturday afternoon, the 28th of April, and in his hotel room he wrote out in handwriting the suggested

terms of a memorandum agreement modifying this former agreement, chiefly because of the cloud on the title, I believe. That pencilled memorandum of his, together with a pencilled letter, he mailed to Charlie Conner that afternoon in Tucson. He wrote it down at the Pioneer Hotel. That is the first signed agreement; then April 28th of 1956 Mr. Driscoll wrote this suggested amendment. Mr. Conner went to work on the suggested amendment and drew up a memorandum agreement, which was signed by Mr. Albert May 16th in Tucson, Arizona. That is the second signed agreement. May 16th it was signed by the Alberts in Tucson, Arizona, and on the same day the signed copies, according to Mr. Driscoll's instructions, were mailed to Mr. Joralemon in San Francisco, and on the same date a copy of it was mailed to Mr. Driscoll in Lead, South Dakota. That was May 16th of 1956. From that time on the total correspondence between the people was with reference with getting rid of the cloud on the title. Mr. Conner, incidentally, had in his hand a thousand dollars which had been left with him by Mr. Joralemon to pay to Mr. Albert as soon as this thing had been signed; and this thing was signed by Mr. Joralemon two or three days later, and on that date he told Conner he could release the thousand dollars and that was done. From then on we have mostly correspondence dealing with the title. Quiet title action was instituted in June of 1956. This agreement, which will be in evidence to the Court, provided the legal expenses would be paid by Mr. Joralemon, but they would be subject to

reimbursement by Mr. Albert under the language which is in the contract—I haven't memorized it, but there is a provision made for the reimbursement of legal expenses which Mr. Joralemon would pay in that connection, it being agreed he would pay that expense. The suit was instituted in June and it was answered and it was sometime along about the middle of August that Mr. Conner got a call from Mr. Driscoll, or they got to talking somehow, and Mr. Driscoll indicated that they were quite anxious to get that cloud cleared up if they could, and did he, Conner, believe there was any way of settling the thing. And he, Conner, believed that there was a possibility and he called Danzey, who was an attorney in Salt Lake City representing Uranium. And he said, "We will take \$10,000." And I think that Homestake had indicated they might be willing to come up with five and there was a day or two there where there were extensive conversations, finally getting together on a price of \$4,000 to settle. It was settled in the middle of August and a check from Homestake Mining Company, Lead, South Dakota office, in the sum of \$4,000 was mailed to the order of Conner & Jones August 17th. That check was dated that day payable to the order of Conner & Jones for \$4,000. There is the first legal question that the evidence is going to have to bear on, as to whether or not there is any [19] ambiguity in the contract as to whether or not \$4,000 was legal expense, within the meaning of the contract.

The Court: What is your position on it?

Mr. McCarty: I take the position on all the reported cases that it is not. There is no ambiguity and it is not legal expense.

The Court: What is your position as to whether it is ambiguous, Mr. Dolph?

Mr. Dolph: Whether it is ambiguous, we do not think it is ambiguous.

The Court: Your position is it is legal expense under the contract?

Mr. Dolph: Yes, sir.

The Court: And reimbursable. And your position is it is not legal expense?

Mr. McCarty: It is not legal expense.

The Court: All right.

Mr. McCarty: Depending upon the Court's disposition to permit parol evidence on the deal, depending upon what your Honor's feeling on parol evidence on that point in the case.

The Court: There is no basis for it now, you have both agreed that it is not ambiguous, it is a matter of interpretation.

Mr. McCarty: I can now set forth to the Court what I will bring in by way of evidence if the Court elects to hear parol evidence on it.

The Court: No, there is no argument.

Mr. McCarty: The Court is not interested in parol evidence on that point?

The Court: Not on that.

Mr. McCarty: All right, sir. At any rate, that \$4,000 payment was sent down here. The closing papers were prepared by Conner, forwarded to a

bank for escrow August 30th, about thirteen days later. The case was actually settled early in September, and on September the 18th, Conner and Jones sent to Homestake their final statement for expenses and attorneys' fees. September the 18th the whole thing was gone, settled and even billed out the attorneys, September 18th. And in Conner's letter of September 18th to Mr. Driscoll sending his bill for having disposed of the matter, he said Mr. Albert is very anxious to get this deal signed up. I don't know just how the various forms of the contract came down here, but I do know that the final executed draft was the result of about two amendations of the original that had been submitted. I do know that a draft was sent down out of Lead, or brought down out of Lead, because Mr. Joralemon was here September 11th. September 11th Mr. Joralemon was here and he at that time with Mr. Albert sat down and the two of them went over the agreement that had been made. At any rate the agreement was finally executed by Mr. and Mrs. Albert September 21, and despite the fact that the quiet title action had not only been disposed of, but had been completely settled and billed out, the contract continued to refer to that old cloud on the title. I don't know why, unless somebody didn't have enough time to redo it. At any rate, it was signed here September 21 by Greenway Albert and his wife, it was mailed to Mr. Joralemon for signature, he signed it and returned it without acknowledgement, it was sent back to him for acknowledgement, finally acknowledged October the 8th. That is

where we stood, all is well, and the payments started coming in. There were no payments made until the title was cleared up and when this thing was signed, then the next payment was made in September, I believe September the 20th.

All right. Now, I will put September 21 on the final contract (indicating on blackboard). Now, November the 5th Mr. Joralemon wrote the letter to Mr. Albert, which will be in evidence, and in which he says: We are reluctantly forced to surrender our lease. The \$7,000 payment which is due will be made and the quitclaim deed provided for a paragraph three of the contract will be forwarded as soon as practicable. That was the letter, it was mailed by Mr. Joralemon November 5th. November 6th the next day, out of the San Francisco office came two checks to Mr. Albert, one of them was for \$1,000, which was the usual monthly rental; the other one was for \$3,932.15, that being their idea of the \$7,000 payment after they had made their adjustment under their theory of that \$4,000. Now, the provisions of the contract itself, paragraph three—and this begins to point out what to me is the second important legal question in the case. As a condition precedent to the right to terminate the contract, and this provision the evidence will show came in at Mr. Albert's insistence, paragraph three of the contract says that they may surrender any time after the payment of the first quarterly payment of \$7,000. The payment of that first quarterly payment is a condition precedent to their right to terminate. And further that the notice shall be ac-

accompanied by a quitclaim deed. Those are the provisions of paragraph three. And an ambiguity arises because whoever drafted the contract literally lifted out of that agreement, which was another provision which now appears in the lease at paragraph thirteen. It was bodily lifted out of the former agreement, or this portion of it was, and it contains another termination agreement in which no reference is made to the quitclaim deed. So that is the second legal question, your Honor has, is there a legal ambiguity there. I believe just as an insight that the Court will be satisfied that the ambiguity, if any, is easily resolved and that the provisions of paragraph three requiring the first quarterly payment to be made is a condition precedent and requiring the deed, are valid provisions of the contract. This was November 5th, came the letter from Mr. Joralemon. The quarterly payment, even on their theory hadn't been made, but what is a day or two. In line with Mr. Dolph's suggestion to the Court that they will show a lot of correspondence and conversation thereafter, they will not. They will show one telephone call from Mr. Albert to Mr. Joralemon, and the date of that call was November 16th, and they will show one letter from Mr. Conner to Mr. Driscoll, the date of which is November 21, period. That is all the calls and telephone calls they will point out to the Court, because that is all there were. On November the 5th we got the letter from Joralemon; November 16th Greenway Albert called Mr. Joralemon in San Francisco and

there were two things discussed, number one, he said: I would like to have the logs on your drilling down there, and number two, is they didn't send me my money. Mr. Joralemon's reply to that was: We will send you the logs and our attorneys are taking care of the money. That telephone call was November 16th. November the 21st, five days later, Mr. Conner addressed a letter to Mr. Dricoll saying that they had not sent the money and Mr. Albert would like to have it. They hadn't sent any money. To that letter Mr. Conner got a very stern reply from Mr. Driscoll, dated November 26th, if my memory doesn't fail me—I will put the original letter in. Mr. Driscoll wrote a very, [24] very stern reply to Mr. Conner, which the Court will have an opportunity to read. The last line in that letter said: You will hear from us shortly. You will hear from us shortly. The evidence will show that we heard not one other single word from anybody until January the 3rd, we got a check in the mail from San Francisco from a secretary of one of the offices up in there: Sorry we made a mistake, here is \$1,200 more. That letter will be in evidence. That was mailed out of San Francisco; I think the letter was dated January 3rd, I am not sure. The draft was dated December 31.

Now, the position we take is simply this, that the payment, the quarterly payment was a condition precedent to the right to terminate and regardless of the position they take on that \$4,000, by their own testimony, taking their own theory of it, they didn't pay what they had to pay as a condition

precedent to their right to terminate until January 3, 1957. And the man who wrote the language, to wit, Driscoll, will testify to the court, at least he testified to me on deposition, that to his intendment, of his own language, the accurate payment was not made until January 3, 1957. And the position we simply take is that of course there had been no valid termination until the condition precedent had been complied with. After we got that letter of January 3 there was a deathly silence pervaded the atmosphere, Mr. Greenway Albert making various trips to Mr. Conner, pointing out to him [25] that he would certainly like to have his money, which was not forthcoming, and accordingly finally on April 16th, Mr. Conner wrote a letter to Mr. Joralemon saying that he couldn't understand why they weren't living up to their contract, in effect. It went on for several pages, and that letter was written April 16th. To that letter we received absolutely no reply and one month later, May 16th, Mr. Conner wrote them again, saying: Would you mind replying to our letter. May 21st we got an answer from Mr. Joralemon saying: Well, Mr. Driscoll should have been in touch with you before now, but surely he will be in touch with you soon. And the next thing we know they got in touch with us by suing us nine days later. At all times under this contract the mining company had the benefit of a provision whereby they could avoid any position of being in default on the payment of money by a simple expedient of going down and depositing in a local bank that amount of money, thereby curing any position of

default with respect to the payment of money. It was that precise provision of the contract they availed themselves of when they filed this suit and deposited the \$23,000, so they could avoid the position of continuing to be in default.

Mr. Bilby: Your Honor, are we going to argue the case now or state the facts?

The Court: You are getting into argument.

Mr. McCarty: All right. At any rate the [26] legal points are what I am trying to get into. That in a nutshell is what the facts of the case are and the legal positions we hold and I think the lawsuit is just that simple.

The Court: I may say to counsel that I have been helped by the statements. I think it was time well spent.

IRA B. JORALEMON

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Dolph:

Q. Will you state your full name, please?

A. Ira B. Joralemon.

Q. You are the plaintiff in this action?

A. I am.

Q. Where do you live, Mr. Joralemon?

A. My home is in Berkeley, California; my office in San Francisco.

(Plaintiff's Exhibit 1 marked for identification.)

Q. (By Mr. Dolph): I hand you Plaintiff's Exhibit 1 for identification, Mr. Joralemon. Would you examine that and state whether your signature is affixed to it? A. It is.

Q. You recognize the other signature? [27]

A. I recognize that, yes.

Q. Who is that?

A. Mr. and Mrs. Albert.

Q. And that was executed by you and the Alberts on what date? A. March 21st, 1956.

(Plaintiff's Exhibit 2 marked for identification.)

Q. (By Mr. Dolph): I hand you Exhibit 2 for identification and ask you to examine it and state whose signatures are affixed to it?

A. Mr. and Mrs. Albert and my own signature.

(Plaintiff's Exhibit 3 marked for identification.)

Q. (By Mr. Dolph): Would you do the same with regard to Exhibit 3 for identification?

A. That is also signed by Mr. and Mrs. Albert and myself. Do you want the date?

Q. No. Can you tell me when you and the Alberts signed Exhibit 3 for identification?

A. The Alberts signed on September 21, 1956. I had it acknowledged on October 8th, 1956.

Mr. Dolph: I offer all these in evidence.

Mr. McCarty: Is 2 for identification the memo of May 16th?

Mr. Dolph: Right.

(Testimony of Ira B. Joralemon.)

Mr. McCarty: I have no objection, your [28] Honor.

The Court: They all may be received as 1, 2 and 3 in evidence.

(Plaintiff's Exhibits 1, 2 and 3 marked in evidence.)

PLAINTIFF'S EXHIBIT No. 1

Tucson, Arizona,
March 21, 1956.

Suggested Terms of Option

From H. Greenway Albert and wife to Ira B. Joralemon or his Assignees on 35 claims of the Cornelia Group, named Cornelia No. 1 to No. 35, inclusive, and the Cornelia Extension A, B, C and D Claims.

1. Joralemon is given 3 months for preliminary exploration for \$1,000 per month paid to Greenway on the first of every month, starting April 1, 1956.

2. At the end of 3 months Joralemon shall pay \$7,000 in addition to \$1,000 per month. These \$1,000 per month payments continue.

3. Beginning at the end of 6 months, Joralemon shall pay \$7,000 at the beginning of every 3 months period, in addition to the \$1,000 per month payments, which shall continue. These such additional \$7,000 payments, together with the regular \$1,000

(Testimony of Ira B. Joralemon.)

per month payments, will hold the option for 15 months from April 1, 1956.

4. At the end of 15 months Joralemon shall pay \$75,000, and the monthly payments of \$1,000 per month shall cease.

5. Beginning 18 months from April 1, 1956, Joralemon shall pay \$50,000 at the start of every succeeding three months period. These quarterly payments, together with a final payment of a smaller amount, shall continue until all payments by Joralemon or his assignees to Albert shall total \$2,000,000, at which time full title to the property shall be transferred to Joralemon, with no further obligation to Albert.

6. This is an option to purchase and not an agreement to purchase, and Joralemon may surrender the option at any time with no obligation save for payment for labor, materials, etc., already incurred by him.

7. Albert will try to obtain the best possible option terms on the Hunter or Copper Giant group of claims, and will assign this option to Joralemon.

8. A formal contract will be drawn embodying the above terms.

Approved in principle, March 21, 1956.

/s/ H. GREENWAY ALBERT,

/s/ MRS. H. GREENWAY ALBERT,

/s/ IRA B. JORALEMON.

Admitted in evidence February 21, 1958.

(Testimony of Ira B. Joralemon.)

PLAINTIFF'S EXHIBIT No. 2

Memorandum Agreement

This Memorandum Agreement, made and entered into this 16th day of May, 1956, by and between H. Greenway Albert and Maja Greenway Albert, husband and wife, hereinafter referred to as Parties of the First Part, and Ira B. Joralemon, hereinafter referred to as Party of the Second Part,

Witnesseth:

Whereas, the parties hereto did on March 21, 1956, enter into a preliminary agreement regarding certain unpatented mining claims situated in the Ajo Mining District, Pima County, Arizona, being thirty-five mining claims of the Cornelia group, named Cornelia No. 1 through Cornelia No. 35, inclusive, and the Cornelia Extension A, B, C and D claims; and

Whereas, the parties hereto are agreeable that that certain preliminary agreement, dated March 21, 1956, be modified as hereinafter set forth.

Now, Therefore, in consideration of the sum of \$1.00 in hand paid by each party to the other, the receipt whereof is hereby acknowledged, it is hereby mutually agreed by and between the parties hereto as follows:

1. That said preliminary agreement dated March 21, 1956, be modified in the following respects:

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 2—(Continued)

(a) That the party of the second part shall, upon the execution of this agreement, pay to the parties of the first part the sum of \$1,000.00, being the sum which the party of the second part was to pay to the parties of the first part under paragraph 1 of the agreement of March 21, 1956.

(b) That the party of the second part pay to the parties of the first part, on or before June 1, 1956, the additional sum of \$1,000.00, which sum is the sum to be paid by the party of the second part to the parties of the first part on May 1, 1956, in accordance with the agreement dated March 21, 1956.

(c) The parties hereto recognize that there are certain title defects in the claims described and the party of the second part desires that the parties of the first part clear title to said mining claims against the Uranium Corporation of America and Mr. and Mrs. John H. White, Jr., either by means of securing quit claim deeds from said persons or by bringing suit to quiet title against them. Said quit claim deeds or ultimate judgment in a court action shall be in a form satisfactory to the party of the second part. If said title defects are not cleared in a manner satisfactory to the party of the second part within a period of two years from the date of execution hereof, then all rights under this agreement and any other agreement between the parties hereto concerning the aforesaid claims are

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 2—(Continued)

terminated. The party of the second part agrees to assume and to pay all necessary legal expenses and court costs in connection with clearing title to said claims. If the parties of the first part bring suit to quiet title against any party suggested by the party of the second part or his counsel, the parties of the first part shall be deemed to have complied with the provisions hereof when the ultimate judgment is entered quieting title against said party.

(d) The party of the second part reserves the right, however, provided he has given ninety days' prior written notice to the parties of the first part, to withdraw from this agreement and any other agreement between the parties hereto concerning the aforesaid claims at any time, upon executing and delivering to the parties of the first part quit claim deeds in and to said mining claims, and provided further the party of the second part has paid all of the aforesaid legal expenses and costs to the date of withdrawal. The party of the second part agrees to do and pay for the necessary assessment work for the year July 1, 1956, to July 1, 1957, unless he has withdrawn from this agreement and any other agreement as hereinbefore provided and provided that said withdrawal is dated not later than April 1, 1957. Any notice of withdrawal shall be sent registered mail to the parties of the first part at Tombstone, Arizona.

(e) Any legal expense incurred incident to the

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 2—(Continued)

foregoing and paid by the party of the second part shall be deducted from future payments to the parties of the first part, prorated over one year's payments as they become due under the terms of the agreement of March 21, 1956.

(f) The provisions of paragraph 7 of the agreement dated March 21, 1956, are hereby terminated and cancelled.

(g) All references in the Memorandum Agreement of March 21, 1956, to the date "April 1, 1956" shall be deemed to mean instead the date upon which the parties of the first part have either secured quit claim deeds or judgment hereinabove set forth acceptable to the party of the second part. All references therein to payments being due at the end of three or six or fifteen months shall be deemed to mean at the end of three or six or fifteen months, as the case may be, after the parties of the first part have received the quit claim deeds or judgment referred to above satisfactory to the party of the second part, it being the intention of the parties hereto that the next payment shall be due on the date of securing the aforesaid deeds or judgment. Notwithstanding anything contained herein to the contrary, the first quarterly payment shall be made within sixty days after securing the aforesaid deeds or judgment and the remaining quarterly payments should be made every three months thereafter.

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 2—(Continued)

(h) The party of the second part shall not be entitled to possession of said mining claims until he has accepted title thereto.

(i) The parties hereto agree to execute a formal agreement involving the Memorandum Agreement of March 21, 1956, as herein modified.

2. Except as herein modified, the Memorandum Agreement dated March 21, 1956, shall remain in full force and effect.

The benefits of this agreement and all other agreements between the parties hereto concerning the claims above mentioned shall inure to the benefit of the heirs, personal representatives or assigns of the parties hereto.

In Witnesseth Whereof, the parties hereto have executed this Memorandum Agreement on the day and year first above written.

/s/ H. GREENWAY ALBERT,

/s/ MAJA GREENWAY ALBERT,

Parties of the First Part.

/s/ IRA B. JORALEMON,

Party of the Second Part.

Admitted in evidence February 21, 1958.

(Testimony of Ira B. Joralemon.)

PLAINTIFF'S EXHIBIT No. 3

Lease and Option to Purchase

Whereas the parties hereto did on March 21, 1956, enter into a preliminary agreement regarding certain unpatented mining claims situated in the Ajo Mining District, Pima County, Arizona, and Whereas that certain preliminary agreement was modified by a memorandum agreement dated May 16, 1956, and Whereas the parties hereto are agreeable that the preliminary agreement of March 21, 1956, as amended by the agreement of May 15, 1956, may be modified in certain respects by this Lease and Option to Purchase Agreement.

Now, Therefore, this lease and option to purchase entered into as of the 1st day of June, 1956, by and between H. Greenway Albert and Maja Greenway Albert, husband and wife, of Tombstone, Arizona, the lessors and optionors (hereinafter called lessors), and Ira B. Joralemon of San Francisco, California, the lessee and optionee (hereinafter called lessee), shall supersede all previous agreements upon the following terms and conditions,

Witnesseth:

1. The Lessors, for and in consideration of the payments hereinafter stated and the covenants and agreements on the part of the Lessee to be kept and performed as hereinafter set forth, hereby lease unto

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

the Lessee, the following named unpatented mining claims, location certificates of which respective mining claims are duly filed for record in the office of the County Recorder of Pima County, Arizona, to which records reference is hereby made for more accurate, complete and detailed description of said claims, and the descriptions of which as set forth and contained in said records are hereby adopted and made a part of this instrument as though fully incorporated herein at length:

Name of Claim	Recorded in Book NNN at Page
Cornelia Extension A	535
Cornelia Extension B	534
Cornelia Extension C	533
Cornelia Extension D	532
Cornelia No. 1	326
Cornelia No. 2	327
Cornelia No. 3	328
Cornelia No. 4	329
Cornelia No. 5	330
Cornelia No. 6	331
Cornelia No. 7	332
Cornelia No. 8	333
Cornelia No. 9	334
Cornelia No. 10	335
Cornelia No. 11	336
Cornelia No. 12	337
Cornelia No. 13	338
Cornelia No. 14	339

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

Cornelia No. 15	340
Cornelia No. 16	341
Cornelia No. 17	342
Cornelia No. 18	343
Cornelia No. 19	344
Cornelia No. 20	345
Cornelia No. 21	346
Cornelia No. 22	347
Cornelia No. 23	348
Cornelia No. 24	349
Cornelia No. 25	350
Cornelia No. 26	351
Cornelia No. 27	352
Cornelia No. 28	353
Cornelia No. 29	354
Cornelia No. 30	355
Cornelia No. 31	356
Cornelia No. 32	357
Cornelia No. 33	358
Cornelia No. 34	359
Cornelia No. 35	360

together with all veins, lodes and mineral deposits in said mining claims, including the dips, spurs, shoots and angles thereof, and any and all shafts, adits, tunnels or other mining workings on the demised claims, with the sole and exclusive possession thereof during the life of this lease, with the sole and exclusive right to prospect, explore, examine, search, sample, test, mine and extract there-

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

from any and all ores, minerals and metals, and to place buildings, equipment, machinery, tools, rails and improvements thereon at the Lessee's sole discretion.

2. This lease shall commence as of the 1st day of June, 1956, and shall expire March 31, 1976, unless sooner terminated in the manner hereinafter provided.

3. Notwithstanding the provisions of paragraph (2) hereof, the lessee may at any time after payment of the first quarterly payment of Seven Thousand Dollars as hereinafter set forth, surrender this lease by giving notice in writing thereof to the lessors, accompanied by an executed and acknowledged quitclaim deed extinguishing all rights of the lessee hereunder and relinquishing to the lessors the demised properties. Upon delivery of such notice and deed and the relinquishment of all the demised properties, all rights and obligations of the parties hereto not then accrued shall cease and terminate. The Lessee agrees to do the necessary assessment work from year to year unless he has withdrawn from this agreement, and provided that such withdrawal shall not be dated between April 1st and July 1st of any year unless the assessment work for that year has been completed. Any notice of withdrawal shall be sent by registered or certified mail to the Lessors at Tombstone, Arizona.

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

4. Lessors agree to furnish Lessee access to such abstracts, deeds and other evidences of title as may be in the Lessors' possession or control and to co-operate with the Lessee, at Lessee's option and expense, to have such abstracts brought down to date and to take such steps and proceedings to perfect title as Lessee shall deem advisable. Lessors agree, but at the expense of the Lessee, promptly and diligently to complete the valid location in accordance with the laws of the United States and of the State of Arizona and to the satisfaction of the Lessee, of such of the hereinbefore named mining claims as the Lessee shall request in writing and to post and file in the proper public offices and in the names of the Lessors, such notices of location and amended notices of location as the Lessee may deem advisable, and to erect such location monuments, stakes and posts for the purpose of defining the boundaries of such claims as located or amended, and sink such discovery shafts as may be required by the Lessee, but all at the sole expense of the Lessee.

5. Lessors further represent and agree that the properties covered by this Lease and Option to Purchase, and each of them, are free from all liens and encumbrances of every nature and description, and during the period thereof the Lessors agree to protect said properties from any and all liens and/or the possibility thereof, except such as may

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

arise from the acts of the Lessee on said properties, and not to encumber any of said properties.

6. The Lessee during his possession of said properties agrees to protect all of said properties against all claims of labor and material men and against all liens and liabilities arising out of his acts upon any of said properties. The Lessor shall have the right to enter the property at any reasonable time for inspection thereof and development reports shall be available to him. Lessee also agrees to post the lien notices on the property as required by the laws of Arizona. Lessee also agrees that in any drilling done on the property where drill hole casings are required, to leave said casings in said holes until Lessors have been paid a total sum of Twenty-five Thousand Dollars (\$25,000) under the terms of payment set forth herein; after said sum has been paid, Lessee may pull or leave casing in their discretion.

7. The parties hereto recognize that there are certain title defects in the claims described, and Lessee desires that Lessors clear their title to said mining claims against the Uranium Corporation of America and Mr. and Mrs. John H. White, Jr., either by securing quitclaim deeds from them or quieting title. Such quitclaim deeds or ultimate judgment in a court action shall be in a form satisfactory to Lessee. If said title defects are not cleared in a manner satisfactory to Lessee within a

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

period of two years from the date hereof, then all rights between the parties hereto under this agreement shall be terminated. Any legal expense incident to the foregoing paid by Lessee shall be deducted from future payments to Lessors, pro rated over one year's payments as they become due.

8. In consideration for the lease hereunder, the Lessee shall pay to the Lessors the following amounts:

(A) The sum of Two Thousand Dollars (\$2,000.00) heretofore paid and receipt of which amount is hereby acknowledged by Lessors.

(B) The sum of One Thousand Dollars (\$1,000.00) each month for fourteen (14) additional months commencing on the date Lessors secure the quit claim deeds or quiet title judgment satisfactory to Lessee as referred to above.

(C) The sum of Seven Thousand Dollars (\$7,000.00) on or before November 8, 1956.

(D) Three additional payments of Seven Thousand Dollars (\$7,000.00) each shall be made three (3), six (6), and nine (9) months, respectively, after the date upon which the payment referred to in subparagraph (C) shall be due.

(E) The sum of Seventy-five Thousand Dollars (\$75,000.00) one year after the date upon which the payment referred to in subparagraph (c) shall be due, and

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

(F) The sum of Fifty Thounsand Dollars (\$50,000.00) shall be be paid fifteen (15) months after the date upon which the payment referred to in subparagraph (C) shall be due, and each and every three (3) months thereafter until the total sum of Two Million Dollars (\$2,000,000) shall have been paid by the Lessee to the Lessors, provided, however, that the last payment hereunder shall be such sum smaller than Fifty Thousand Dollars (\$50,000) as shall be necessary to equal the above aforesaid total of Two Million Dollars (\$2,000,000).

9. If at any time there be more than four parties entitled to payments hereunder, Lessee may withhold payments thereof unless and until all parties designate, in writing, in a recordable instrument to be filed with Lessee, a common agent to receive all payments due to them hereunder, and to execute division and transfer orders on behalf of said parties and their respective successors in title.

10. Lessee will not hold Lessors liable for any injury to or death of persons or loss of or damage to property by fire, water, wreck or other casualty occurring upon the demised properties arising from the existence, maintenance or operation of machinery, equipment, excavations or mine workings or occupation of the premises under this lease by Lessee, and Lessee shall release and discharge, and agree to indemnify and save harmless Lessors and each of them from and against any and all

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

claims, liability, demands, causes of action, judgment, costs, expenses and attorneys' fees arising or growing out of injury to or death of persons, or loss or destruction of or damage to property from any cause resulting directly or indirectly from the operations of the Lessee upon the demised properties or its occupancy thereof, or from the use of said properties by the Lessee.

11. All mines on said premises shall be opened, used and worked in such manner only as is usual and customary in skillful and proper mining operations and so as not to do, cause or permit any unnecessary or unusual permanent injury to the mine or any improper interference or hindrance in the subsequent operation of said mine or mines; provided that, subject to the said requirements, the Lessee may from time to time use and employ such methods of mining as to the whole or any part of the ore upon said property, or under any portion thereof, as he may desire or find most profitable and economical, or may, when he deems it necessary or desirable, discontinue operations entirely so long as he shall well and truly meet his obligations to perform assessment work and make the payments required hereunder; and provided further that nothing contained in said lease shall require the Lessee to mine, preserve or protect in his mining operations any ore which, under good mining practices, cannot be mined and shipped at a profit to the Lessee at the time encountered.

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

12. The Lessee shall agree to pay any and all lawful public taxes and assessments, whether general, specific, or otherwise, that may be levied against his mining equipment and property during the period of said lease, and shall also agree to pay all taxes, State or Federal, which may become due on account of his mining operations or his occupancy of said properties, except taxes accruing by reason of any payments made to the Lessors.

13. Lessee shall agree upon termination of the lease from any cause (other than by reason of transfer of title to the demised claims to the Lessee) to immediately and peaceably surrender possession of the leased property to the Lessors and the workings on said properties shall be left as accessible as is required by good mining practices, and Lessee shall have ninety (90) days after any such termination or surrender in which to remove all engines, tools, machinery, buildings, structures, railroads, or mine tramways, and all other property of every nature and description erected, placed or situated on the premises by him. It shall be further agreed that said lease may be terminated at any time by the Lessee as to all or any portion thereof by giving the Lessors written notice of such intention, and that upon termination or surrender the Lessee will, upon the request by the Lessors, execute and record in the appropriate public office a formal release and

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

discharge evidencing such termination, provided that payments hereunder shall continue as provided hereunder until the lease shall have been terminated as to all of the demised properties.

14. If the payment provided for herein be and remain unpaid after the days and times specified or if the Lessee shall fail to keep any of the other conditions in said lease expressed, and if any such failure shall continue for thirty (30) days after written notice from the Lessors specifying any such default, then and in that event the Lessors may immediately enter upon and take possession of the leased premises and any ores thereon, and declare the lease terminated. It shall be agreed, however, that any default claimed and noticed against Lessee as respects the payment of money can be cured by the deposit in escrow in a reputable bank or trust company of the amount in controversy, subject to notice of such deposit to Lessors, and to remain in escrow until decision by court or arbitrators as the parties may elect.

15. If Lessee shall be delayed or prevented from performing the obligations under this Lease and Option to Purchase, on his part to be performed, by reason of any act of God, strike, or threat of strike, sabotage, fire, flood, weather or other act of nature, war, insurrection or mob violence, inability to secure labor or materials, equipment or supplies, delay in, interruption of or inability to secure transportation,

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

orders or restrictions, regulations or requirements of the Federal or State government relating to manpower, materials or supplies, mining operations or otherwise, unavoidable casualties, injunction or other legal proceeding, or any cause, act or occurrence beyond the control of the Lessee, whether of the same or of a different kind or character than those hereinbefore mentioned, then and in such event the Lessee shall be excused from the performance of its obligations and payments as provided herein shall be suspended under this lease during such period of delay and any such delay shall not be deemed a breach of this lease nor shall it be deemed a default on the part of Lessee. The Lessee agrees to use all reasonable diligence to remove any such cause of disability as may occur from time to time.

16. The Lessee shall have the option, exercisable at any time during the term of the lease hereunder, to purchase all of the demised claims, provided this agreement is in full force and effect. Said option shall be exercisable by a notice in writing thereof to the Lessors. The purchase price shall be the amount of Two Million Dollars (\$2,000,000) on which sum shall be credited all payments theretofore made by the Lessee to the Lessors hereunder. The balance of said purchase price shall be paid to the Lessors upon delivery of good and sufficient deeds for the demised properties conveying good and merchanta-

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

ble title thereto, free of all liens and encumbrances and subject only to the paramount title of the United States.

17. When the total payments theretofore made by the Lessee to the Lessors under this Lease and Option to Purchase shall total the amount of Two Million Dollars (\$2,000,000) title to the demised properties shall be transferred to the Lessee, and the Lessors agree to execute in favor of the Lessee good and sufficient deeds for the demised properties conveying good and merchantable title thereto, free of all liens and encumbrances and subject only to the paramount title of the United States.

18. Any notice required or permitted to be given hereunder (including notice of the exercise of any option) shall be considered as delivered seventy-two (72) hours after the same shall have been deposited in the United States mail, duly registered or certified with postage thereon prepaid, addressed, if to Lessee, to Ira B. Joralemon, c/o Homestake Mining Company, 100 Bush Street, San Francisco 4, California, and if to Lessors to H. Greenway Albert (who is hereby designated as the representative of the Lessors), Tombstone, Arizona, or in the event of the death of said Lessors' representative, then to both the Lessors undersigned, their heirs or legal representative, at Tombstone, Arizona. Lessee, Lessors and the Representative of Lessors may change

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

said addresses upon written notice given to the other party hereto.

19. This Lease and Option to Purchase shall inure to the benefit of and be binding upon the respective heirs, administrators, executors, and assigns of the parties hereto. Lessee may assign his right and obligations hereunder.

20. The relationship hereby created between the parties is that of landlord and tenant or, in the event that title to the properties shall pass to the Lessee hereunder, that of buyer and seller, and not of co-partnership or joint venture.

21. The parties hereto agree to execute any and all documents and agreements which shall be necessary fully to carry out the provisions of this Lease and Option to Purchase.

In Witness Whereof, the parties have executed this Lease and Option to Purchase as of the date first hereinbefore written.

/s/ H. GREENWAY ALBERT,

/s/ MAJA GREENWAY ALBERT,
Lessors and Optionors.

/s/ IRA B. JORALEMON,
Lessee and Optionee.

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

State of Arizona,
County of Cochise—ss.

This instrument was acknowledged before me this 21st day of September, 1956, by H. Greenway Albert and Maja Greenway Albert, husband and wife.

[Seal] /s/ CHARLES E. CONNER,
Notary Public.

My Commission expires: March 16, 1958.

State of California,
City and County of San Francisco—ss.

This instrument was acknowledged before me this 8th day of October, 1956, by Ira B. Joralemon.

[Seal] /s/ ALICE McCUE,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires May 5, 1958.

Admitted in evidence February 21, 1958.

Q. (By Mr. Dolph): In connection with Exhibit 3 in evidence, paragraph seven refers to certain title defects. Are you familiar with the activity that took place in connection with those title defects?

(Testimony of Ira B. Joralemon.)

A. Moderately familiar, not all the details, but I followed the general procedure.

Q. You know you had Mr. Conner institute an action? A. Correct.

Q. And that you assumed the expenses, his attorney's fees and court costs?

A. That was correct.

Q. And all other legal expenses? A. Yes.

Q. After the execution of your original agreement, did you, your agents or independent contractors go in and explore the mining property referred to in those agreements?

A. We did, after the title was cleared. We did not do the actual exploration until the title was cleared.

Q. When you refer to the title being cleared, you are referring to the defects of title referred to in paragraph seven of the agreement?

A. That is true. [29]

Q. Your White and Uranium Company?

A. That is true.

Q. When is it you went in and started your work?

A. It was approximately—may I refer to the memorandum?

Mr. Dolph: Do you have any objection, Mr. McCarty?

Mr. McCarty: No, I haven't any objection.

The Witness: It was approximately—it was in the last week in September, close to the 1st of October.

(Testimony of Ira B. Joralemon.)

Q. (By Mr. Dolph): Can you tell the Court approximately what the work was that you did?

Mr. McCarty: I object on the ground it is immaterial, save insofar as it is intended to prove that they did enough work to comply with the contract, to do the assessment work, and as to that point I will stipulate that they did that much work. Aside from that it is immaterial what they did on the premises.

Mr. Dolph: It is material as to the good faith of the tenant, your Honor.

Mr. McCarty: That isn't an issue in the case.

The Court: I wouldn't see the materiality of that. There is no question of good faith here, is there, Mr. McCarty?

Mr. McCarty: Sir?

The Court: As I understand, you are not questioning the good faith?

Mr. McCarty: No. I will stipulate they went in and [30] did all the work the contract required them to do.

Mr. Dolph: Will you stipulate proper assessment work affidavits were filed?

Mr. McCarty: I will stipulate that they conformed exactly with the contract in respect to the manner in which they drilled the holes, left the holes and did the assessment work.

Mr. Dolph: All right.

Q. (By Mr. Dolph): On or about the 4th of November, what were your findings on these properties?

(Testimony of Ira B. Joralemon.)

A. We found absolutely no ore. The geological theory on which the work was based was partly correct, but we didn't find any ore.

Q. Did you have any correspondence with Mr. and Mrs. Albert in connection with that on or about that date?

Mr. McCarty: What date are you referring to, Mr. Dolph?

Mr. Dolph: I said November 3rd or 4th.

A. I wrote Mr. Albert, I believe it was November 5th, telling him I was sorry we hadn't found any ore——

Mr. McCarty: One moment, Mr. Joralemon. Your Honor, I think that what you said will appear from the letter itself. I think the question has been answered, if the Court please, when he testified he wrote them on November 5th.

The Court: I think, Mr. Joralemon, counsel is going [31] to show you your letter now.

(Plaintiff's Exhibit 4 marked for identification.)

Q. (By Mr. Dolph): Handing you Exhibit 4 for identification, is that the letter you have referred to? A. That is the letter.

Q. Can you tell us from looking at that when it was you mailed that to Mr. and Mrs. Albert?

A. On November 5th, 1956.

Mr. Dolph: Offer Exhibit 4 into evidence.

Mr. McCarty: No objection.

(Testimony of Ira B. Joralemon.)

The Court: It may be received as Exhibit 4 in evidence.

(Plaintiff's Exhibit 4 marked in evidence.)

PLAINTIFF'S EXHIBIT No. 4

November 5, 1956

Mr. H. Greenway Albert,
P. O. Box 246,
Tombstone, Arizona.

Dear Greenway:

As we have found no ore in five drillholes on your Cornelia group of claims, I am reluctantly forced to surrender the lease and option to me on the 39 claims in the Ajo mining district that was signed by you and Mrs. Albert on September 21, 1956. The \$7000 payment due on November 8, 1956, will be paid when due, and the quitclaim deed specified in Paragraph 3 of the contract will be sent to you as soon as practicable.

While we found a little lean disseminated copper bearing porphyry in one hole, our drilling proved that in most of the area either deep fanglomerate or barren pre-Cambrian micaceous quartzite underlie 100 to 200 feet of alluvium. There is not room for a valuable ore body between these two barren formations.

(Testimony of Ira B. Joralemon.)

I am sorry we did not have better luck in the exploration.

Yours sincerely,

/s/ IRA B. JORALEMON.

IBJ:B

cc: Mrs. Maja Greenway Albert

Mr. Charles E. Conner

Dr. D. H. McLaughlin

Mr. Kenneth C. Kellar

Admitted in evidence February 21, 1958.

Q. (By Mr. Dolph): You did move off of the property covered by the agreements, did you not, Mr. Joralemon? A. Immediately.

Q. About when was that?

A. About the 4th of November.

Q. Have you ever been back on the properties since then? A. Never have.

Q. Did you have any contact with Mr. Albert shortly after you had written this letter of November 5th? A. I did.

Q. What kind of contact was that?

A. He telephoned to me—— [32]

Q. Approximately when?

A. Approximately November 16th or 18th.

Q. Do you know his voice over the telephone?

A. I do.

(Testimony of Ira B. Joralemon.)

Q. Would you relate to us what that conversation was, as nearly as you can recall it?

A. He first asked me if I would send him copies of the logs of the holes, giving the results of this exploration work; and I said I would be glad to do so. And he also said that he did not think that he had been paid the right amount under the contract, the right payment that was due early in November, the quarterly payment; and I said that that was a legal matter to decide how much of the expenses of clearing the title from Uranium Corporation could be deducted, and that I couldn't pass on that.

Q. Was there any discussion between you as to his receipt of your letter of November 5th?

A. He mentioned the fact that he had received it and was sorry we hadn't found ore.

Q. Did he request from you any release or quitclaim deed to those mining claims?

A. He did not.

Q. Has he ever at any time since then made such a request?

A. Through Mr. Conner in April, I think it was, April [33] the following year.

Q. Of 1957? A. 1957.

Q. But up until that time? A. No word.

Q. You have never received such a demand or request?

A. Not only that, but I did not know that the quitclaim deeds had not been sent.

Q. Did you in your discussion with Mr. Albert,

(Testimony of Ira B. Joralemon.)

did he tell you anything to the effect that it was his position that until the deed or release had been received by him there would be no termination on the lease and option?

Mr. McCarty: I object to his leading the witness. The witness has already testified to what the conversation was and I don't see any purpose to be served in a bunch of leading questions as to what was not said.

The Court: The question is leading.

Mr. Dolph: I will withdraw it.

Q. (By Mr. Dolph): Have you related the whole conversation you had with Mr. Albert?

A. I have.

Q. Did you respond to Mr. Albert's request to furnish him with information in connection with your logs?

A. I did. I sent him copies of the logs and a sketch of the location of the holes. [34]

Mr. Dolph: I can't find the original of this letter from Mr. Conner, Mr. McCarty. Do you object to this copy that was in the deposition on the ground of the best evidence?

Mr. McCarty: Is that the letter of April 16th?

The Witness: I think the original may be in my brief case.

Mr. McCarty: I have no objection to the use of the copy, Mr. Dolph.

(Plaintiff's Exhibit 5 marked for identification.)

(Testimony of Ira B. Joralemon.)

Q. (By Mr. Dolph): Handing you Exhibit 5 for identification, and ask you if that is your letter to Mr. Albert? A. That is.

Q. And you sent this to him on or about November 16th?

A. On November 16th is correct.

Mr. Dolph: I offer it in evidence.

Mr. McCarty: No objection.

The Court: It may be received.

(Plaintiff's Exhibit 5 marked in evidence.)

PLAINTIFF'S EXHIBIT No. 5

November 16, 1956

Mr. H. Greenway Albert,
P. O. Box 246,
Tombstone, Arizona.

Dear Greenway:

Following our telephone talk of this morning, I am sending you herewith the logs of our five drill-holes at Ajo and a sketch showing the location of these holes.

Holes 2, 3 and 4 showed that the fanglomerate extends much further east under the deep alluvium than I expected. Holes 1 and 5 went directly from alluvium into a complex, highly altered granitized quartzite or quartz mica schist, with inclusions of dark altered volcanic rock. This is almost certainly

(Testimony of Ira B. Joralemon.)

the pre-Cambrian "Cardigan Gneiss" that Gilluly maps as occurring 4 to 8 miles northwest of your property. This same ancient rock was cut by the last 35 ft. in our Hole No. 3.

Between the fanglomerate and the gneiss our Holes 2, 3 and 4 cut a partly porphyritic acid igneous rock that is probably a phase of the monzonite porphyry. This porphyritic rock is slightly pyritic in places in Holes 2 and 4, and a very small amount of disseminated chalcopyrite was noted from 388 to 395 ft., and at 565 ft. in Hole 2.

While the interpretation of the geology under the thick alluvium is uncertain, it seems likely that a large northeast fault, dipping west, brings in the pre-Cambrian. This means that there is only a narrow belt of monzonite or similar intrusive. This intrusive is so slightly mineralized that I can see no chance that it contains workable ore in this area.

I am sorry that we did not succeed in finding ore. We tried hard. Maybe some other theory will be more successful.

With kind regards for Mrs. Albert,

Yours sincerely,

/s/ IRA B. JORALEMON.

IBJ:B

cc: Dr. D. H. McLaughlin

Admitted in evidence February 21, 1958.

(Testimony of Ira B. Joralemon.)

(Plaintiff's Exhibit 6 marked for identification.)

Q. (By Mr. Dolph): I hand you Exhibit 6 for identification and ask you if you recognize that?

A. I do.

Q. Did you receive that letter?

A. I did not personally. It is addressed to Mr. Driscoll. I saw it later. [35]

Q. You saw it?

Mr. McCarty: I will make any stipulation with respect to the letter that you want, if you want it in evidence at this time.

Mr. Dolph: We might as well stipulate that this was sent to Mr. Driscoll on or about the date it bears.

Mr. McCarty: I will stipulate the letter is an original letter signed by Mr. Conner and that it was sent by Mr. Conner to Mr. Driscoll on or about the date which appears on the letter.

Mr Dolph: I offer it in evidence.

Mr. McCarty: No objection.

The Court: What was that date?

Mr. Dolph: November 21, 1956.

The Court: It may be received.

(Plaintiff's Exhibit 6 marked in evidence.)

(Testimony of Ira B. Joralemon.)

PLAINTIFF'S EXHIBIT No. 6

Conner & Jones
Attorneys at Law
P. O. Box 310
509-514 Valley National Building
Tucson, Arizona

November 21, 1956

Mr. R. E. Driscoll, Jr.,
Kellar & Kellar & Driscoll,
Attorneys at Law,
Lead, South Dakota.

Re: Homestake Mining Company—
H. Greenway Albert.

Dear Mr. Driscoll:

Mr. H. Greenway Albert has been in to see me relative to the payment of \$7000.00 which was to be made by Mr. Joralemon. Mr. Albert brought in a check for \$3932.15, being the balance of the \$7000.00 which Mr. Joralemon claims is due.

In checking the voucher we find that not only the legal expense of \$601.77 was taken into consideration but, also, the \$4000.00 which Mr. Joralemon paid to Mr. White and others to secure a prompt settlement of the suit to quiet title. In discussing that settlement, it was distinctly understood that this \$4000.00 was not to be charged against Mr. Albert.

(Testimony of Ira B. Joralemon.)

Also the statement shows that Mr. Albert was charged 12/18ths of the legal expense of \$601.77 whereas we figure he should only be charged 5/12ths or \$250.74.

We feel that Mr. Albert should receive a check for \$6749.26 and would appreciate your taking this up with Mr. Joralemon at an early date and let us hear from you.

Yours very truly,

CONNER & JONES,

By /s/ CHARLES E. CONNER.

CEC:CR

cc: to Mr. H. Greenway Albert,
P. O. Box 246,
Tombstone, Arizona.

Admitted in evidence February 21, 1956.

(Plaintiff's Exhibit 7 marked for identification.)

Q. (By Mr. Dolph): I hand you Plaintiff's Exhibit 7 for identification and ask you if you recognize that as a copy of a letter that you received on or about two or three days later than the date it bears? A. I do.

Q. That was signed by Mr. Conner?

A. Correct.

(Testimony of Ira B. Joralemon.)

Mr. Dolph: Will you stipulate to the same effect [36] with regard to this exhibit, Mr. McCarty? It is a letter of April 16th.

Mr. McCarty: I am sure that is a correct copy of the original, Bill.

Mr. Dolph: As far as I know it is, yes.

Mr. McCarty: I will stipulate that on that date Mr. Conner addressed a letter to Mr. Joralemon, it was mailed on or about that date, and that is a true copy of it. I make that in reliance on the fact it is a true copy.

Mr. Bilby: When the depositions were taken Mr. Conner was there then?

Mr. McCarty: I understood Mr. Joralemon to say he had the original in the courtroom.

Mr. Dolph: We will be glad to produce that. May we have an opportunity to let him get his briefcase and substitute the original?

Mr. McCarty: To save time I will so stipulate.

Mr. Dolph: All right. I offer that in evidence.

The Court: Received as 7 in evidence.

(Plaintiff's Exhibit 7 marked in evidence.)

PLAINTIFF'S EXHIBIT No. 7

April 16, 1957

Mr. Ira B. Joralemon,
c/o Homestake Mining Company,
100 Bush Street,
San Francisco 4, California.

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 7—(Continued)

Re: Lease and Option to Purchase

Dear Mr. Joralemon:

We are writing this letter at the request of Mr. H. Greenway Albert and his wife, Maja Greenway Albert, of Tombstone, Arizona, in connection with that certain Lease and Option to Purchase which was entered into by and between H. Greenway Albert and Maja Greenway Albert, husband and wife, as lessors and optionors, and Ira B. Joralemon, as lessee and optionee.

We call attention to paragraph 2 of said agreement which provides that the lease shall commence as of the first day of June, 1956, and shall expire March 31, 1976, unless sooner terminated in the manner thereafter provided in said agreement. Paragraph 3 of said agreement provides that the lessee may at any time after the payment of the first quarterly payment of \$7000.00 surrender the lease by giving notice in writing thereof to the lessors, accompanied by an executed and acknowledged quitclaim deed extinguishing all rights of the lessee thereunder and relinquishing to the lessors the demised properties. Said paragraph further provides that upon delivery of such notice and deed and the relinquishment of all of the demised properties, all rights and obligations of the parties thereto not then accrued shall cease and terminate, and also provides that lessee may not withdraw from said

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 7—(Continued)

lease agreement between April 1st and July 1st of any year unless the assessment work for that year has been completed.

On November 5, 1956, you wrote a letter to Mr. Albert in which you advised him that you were forced to surrender the lease and option. In your letter you further stated that the \$7000.00 due on November 8, 1956, would be paid when due "and the quitclaim deed specified in paragraph 3 of the contract will be sent to you as soon as practicable." It is our opinion that your letter of November 5, 1956, in no way complies with the provisions of paragraph 3 of said agreement. Furthermore, as of this date no quitclaim deed, as provided for in said agreement, has been delivered to the lessors.

Therefore, it is our clients' position that the lease and option to purchase is still in full force and effect and they have advised us that there are five monthly payments of \$1000.00 each due, and, also, the quarterly payment of \$7000.00 due on February 8, 1957, has not been paid, and demand is hereby made upon you for the payment of said sums totaling \$12,000.00, less that portion of the legal expense of \$601.77 which you would be entitled to be reimbursed for.

In November of 1956, Mr. and Mrs. Albert received a check from the Homestake Mining Company for \$3932.15 which purported to be the quarterly payment of \$7000.00 due on November 8,

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 7—(Continued)

1956, from which you deducted the sum of \$3067.85, claiming that to be the correct amount to deduct for legal expenses.

We wrote Mr. R. E. Driscoll, Jr. on November 21, 1956, advising him that our calculations showed that only the sum of \$250.74 should have been deducted from said payment of \$7000.00, We also advised him that the \$4000.00 which was paid in settlement of the suit to quiet title was not a legal expense under the terms of the contract.

On November 26, 1956, Mr. Driscoll advised us that we would no doubt be hearing from San Francisco, either directly or through his office, in the near future in reply to our letter of November 21, 1956. To date we have not received any such reply. However, on December 31, 1956, a check in the sum of \$1286.52 was sent to Mr. Albert with the simple explanation that the same covered an error made in computation in regard to the prior check. Our calculation shows that you still owe Mr. and Mrs. Albert the sum of \$1535.59 in connection with the quarterly payment due on November 8, 1956.

Our clients are assuming that you will live up to the terms of the Lease and Option to Purchase and do the assessment work on the mining claims covered by the agreement for this year.

Our clients take the position that the Lease and Option to Purchase agreement is still in full force

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 7—(Continued)

and effect, and demand is hereby made upon you for full compliance therewith, and consequently have not cashed the checks mentioned in this letter, to wit, one for \$3932.15 and one for \$1286.52.

Yours very truly,

CONNER & JONES,

By.....

CEC:CR

Admitted in evidence February 21, 1958.

Q. (By Mr. Dolph): Mr. Joralemon, between your letter of November 5th and this letter, which is Exhibit 7 in evidence, in the neighborhood of April 16th, 1957, was any demand made upon you to furnish Mr. and Mrs. Albert with a release or quitclaim relating to the mining claims covered by your lease [37] and option agreement?

A. No, sir.

Q. Did you have any knowledge at that time that Mr. and Mrs. Albert took the position that the furnishing of such a release of quitclaim was a prerequisite to a termination of such lease and option?

Mr. McCarty: I object on the ground it is immaterial, leading.

The Court: It may stand. He may answer.

(Testimony of Ira B. Joralemon.)

Q. (By Mr. Dolph): Do you remember the question, Mr. Joralemon?

A. I remember the question. I did not.

Q. Can you answer the same question with regard to such a position in connection with a payment of everything that was due under the quarterly payment falling due November 18th?

A. That was never taken up with me and I did not know it was questioned. I knew there was a controversy as to the amount due, but I was never told that the contract could not be cancelled until that controversy had been settled.

Q. If you had received a request or demand for a release of quitclaim deed from Mr. Albert or anybody acting on his behalf, what would you have done?

Mr. McCarty: I object on the ground that is a wholly immaterial and improper question, if the Court please, to ask what a witness would have done if something would have happened. [38]

The Court: Objection sustained.

Mr. Dolph: If the Court please, may I be heard on that? We have a question of waiver or estoppel in connection with this. I think we have a right to prove that Mr. Joralemon stood ready, willing and able to furnish anything that was requested at any time, and that he would have done so had it been requested.

Mr. McCarty: Whether or not the facts of the case are such as to prove a reliance on the conduct of another is a matter to be found from the facts

(Testimony of Ira B. Joralemon.)

and circumstances of the case, not the witness' self serving declaration that, "I relied on so and so." That is the ultimate fact in the case to be determined from the circumstances.

The Court: I am going to let it stand. I am going to let him answer it. I don't know whether it could become material or not, but I will let him answer it and disregard it if it should become immaterial.

A. I would have seen that the quitclaim deed was sent at once if I had been informed that it had not been sent and had been asked for.

Mr. Dolph: You may cross-examine.

Cross-Examination

By Mr. McCarty:

Q. Mr. Joralemon, you have been a mining engineer for [39] many, many years now, right?

A. I have.

Q. In the course of your employment you find it expedient to find mining properties and interest mining company clients of yours in the properties, right? A. That is true.

Q. In this particular case you did in fact interest in this particular property the Homestake Mining Company, is that correct?

A. Substantially correct. It wasn't the full way in which it came up, but that is substantially correct.

Q. As a result of your discussions with Home-

(Testimony of Ira B. Joralemon.)

stake, the deals you made with Mr. Albert belonged ninety per cent to the Homestake Mining Company and ten per cent to you or to your designee, right?

A. There was the arrangement by which I was to participate to the extent of ten per cent if I so desired, after a certain amount had been spent.

Q. And Homestake was to participate to the extent of ninety per cent?

A. They were to do that and I was to plan the work.

Q. You are familiar with Mr. Driscoll who sits here in the courtroom? A. I am.

Q. He is an attorney in Lead, South Dakota?

A. Yes. [40]

Q. And to your knowledge he is one of the attorneys for Homestake Mining Company, right?

A. He is.

Q. Your office is now and was during the course of this negotiation in San Francisco, California?

A. That is correct.

Q. That is also the home office of the Homestake Mining Company? A. It is.

Q. You of course recall when you came down here to Tucson about March 21 and signed that first agreement which is now in evidence as Plaintiff's Exhibit 1, you recall coming down and talking to Greenway Albert about that? A. I do.

Q. You recall after that this title difficulty arose and became more serious as time went by, and eventually I suppose you were active in getting Mr. Driscoll to come to Tucson, Arizona, to see what he

(Testimony of Ira B. Joralemon.)

could do about it? A. Yes.

Q. You recall this memorandum agreement of May 16, which is now in evidence as Plaintiff's Exhibit 2, was mailed to you in San Francisco, California, you remember that?

A. That is correct.

Q. You possibly remember you signed it within a few days [41] of that date and indicated to Mr. Conner he was at liberty to deliver to Mr. Albert the sum of \$1,000, which you had left in Mr. Conner's hands? A. That is my recollection.

Mr. McCarty: I wonder if we could have that letter?

(Defendant's Exhibits A and B marked for identification.)

Q. (By Mr. McCarty): Starting first with this B for identification, Mr. Joralemon, it is a copy of a letter which I have in my file. Would you examine that, please?

As far as you know that is a true copy of the letter which you got from Mr. Conner forwarding this memorandum agreement of May 16, which is Plaintiff's Exhibit 2?

A. As far as I know it is.

Q. You probably have the original in your file here?

A. Not here. I don't know where that is.

Mr. McCarty: We will offer that in evidence.

Mr. Dolph: No objection.

The Court: It may be received as B in evidence.

(Defendants' Exhibit B marked in evidence.)

(Testimony of Ira B. Joralemon.)

DEFENDANTS' EXHIBIT B

May 16, 1956

Mr. Ira B. Joralemon,
c/o Homestake Mining Company,
100 Bush Street,
San Francisco, California.

Re: Mr. and Mrs. Greenway Albert.

Dear Mr. Joralemon:

Pursuant to Mr. Driscoll's instructions, we are enclosing you herewith two copies of the Memorandum Agreement which have been executed by Mr. and Mrs. Albert. We are sending a copy of this agreement direct to Mr. Driscoll. If the agreement, as drawn, meets with your approval will you kindly execute the same and return one executed copy to us.

Please also let us know when we may release the \$1,000.00 to Mr. and Mrs. Albert.

Yours very truly,

CONNER & JONES,

By.....

CEC/vsb

Enclosures

cc: Mr. R. E. Driscoll, Jr.

Admitted in evidence February 21, 1958.

(Testimony of Ira B. Joralemon.)

Q. (By Mr. McCarty): To that letter, Mr. Joralemon, you replied with this letter which is Defendants' Exhibit A for identification, is that correct?

A. That is correct.

Mr. McCarty: We will offer A into evidence.

Mr. Dolph: No objection.

The Court: It may be received as A in evidence.

(Defendants' Exhibit A marked in evidence.)

DEFENDANTS' EXHIBIT A

May 21, 1956.

Mr. Charles E. Conner,
P. O. Box 310,
Tucson, Arizona.

Dear Mr. Conner:

On my return to San Francisco I have gone over the agreement you sent me on May 16 and find it in order. I am therefore executing the agreement and returning the original to you herewith.

It will be in order for you to release the first payment of \$1,000 to Mr. and Mrs. Albert on receipt of this letter.

I hope to find out the full name of Mrs. John H. White Jr., and the White's home address in Salt Lake, and expect to be able to send these to you tomorrow.

(Testimony of Ira B. Joralemon.)

Yours very truly,

/s/ IRA B. JORALEMON.

IBJ:B

Enc.

cc: Dr. Donald H. McLaughlin

Mr. R. E. Driscoll, Jr.

Admitted in evidence February 21, 1958.

Q. (By Mr. McCarty): Then I would assume, Mr. Joralemon, from the tenor of this letter of May 21 that it is the letter with which you returned the memorandum agreement of May 16th?

A. It says in the letter it is accompanied by the contract.

Q. Authorizing Mr. Conner to release the \$1,000 to Mr. Albert, right? A. Yes.

Q. Following that letter, Mr. Joralemon, the fact of the matter is, the next few months were largely taken up with the matter of cleaning up the title defect? A. I couldn't hear you.

Q. I say, following that letter of May 21, the next couple of months were involved in the proposition of trying to get the title cleared up?

A. That is right.

Q. Mr. Driscoll was working with Mr. Conner in that respect? A. He was.

Q. Mr. Driscoll, as an attorney for the Home-stake people, I assume was also acting as your at-

(Testimony of Ira B. Joralemon.)

torney in working together with Mr. Conner in trying to clear up the [43] title defect?

Mr. Dolph: May I object to this line of questioning as not being material to any issue in the case.

The Court: What is the purpose of it?

Mr. McCarty: It is preliminary to certain of the acts thereafter taken by Mr. Driscoll. It goes somewhat to his agency. A lot of the things in this were done and signed by Mr. Driscoll. I am curious to know whether or not he was Mr. Joralemon's attorney.

The Court: He may answer that.

The Witness: Would you mind repeating the question?

Q. (By Mr. McCarty): In connection with clearing up the title defects, Mr. Driscoll was representing you as well as Homestake, I would take it? A. He was.

Q. In connection with attempting to negotiate a contract into final form out there on that lease option, I would assume he was your attorney as well as Homestake's? A. He was.

Mr. Dolph: We will stipulate that Mr. Driscoll was Mr. Joralemon's attorney, your Honor.

Q. (By Mr. McCarty): Do you recall how you found out that the cloud on the title had been cleared up?

A. I was told that by telephone and I don't remember whether it was Mr. Driscoll or who told me on the telephone. [44]

Q. At any rate, a little while after you went onto the property and started work?

A. Shortly thereafter.

Q. Getting back, Mr. Joralemon, to this letter of November the 5th, Plaintiff's Exhibit 4, I take it you had probably read the contract between you and Mr. and Mrs. Albert, that is the final contract which is in evidence as Plaintiff's Exhibit 3, I take it you had read that agreement before you signed it? A. I had read it.

Q. And I notice in here in your letter you pointed out that the \$7,000 payment would be paid when due? A. Correct.

Q. It was due two days later or three days later? A. Right.

Q. I notice you also pointed out that the quit-claim deed specified in paragraph three would be sent as soon as practicable?

A. That is correct.

Q. I take it you took it to be your duty under the contract to send such a deed?

Mr. Dolph: I object to what he took to be his duty, your Honor. That is a question for the Court.

The Court: He may answer that.

Q. (By Mr. McCarty): You took it to be your obligation [45] under the lease to forward such a deed, right? A. Yes.

Q. What did you do to the end that such a deed be sent?

A. I called up—I called up somebody in the Homestake office, I am not sure whom, and had sent

(Testimony of Ira B. Joralemon.)

them a copy of my letter to Mr. Albert and asked if they would take care of the quitclaim deed.

Q. As a matter of fact, the person you talked to up there was Mr. Hamilton, wasn't it?

A. I think it was Mr. Hamilton.

Q. Who is Mr. Hamilton, who was he at that time?

A. He was secretary of Homestake Mining Company.

Q. He maintained his office there in San Francisco? A. He did.

Q. Within a day or two at the most of the date of this letter, November 5, 1956, you called Mr. Hamilton, the secretary of Homestake Mining Company, enclosing a copy of this and asking that he take care of the deed which you thought to be required, right? A. That is correct.

Q. Did you at any time subsequent to that time make any inquiry as to whether or not that had been done?

A. I did not, not until after receiving Mr. Conner's letter in April or May.

Q. All right, sir. I believe you have told us that Mr. Albert [46] called you November 16th—to refresh your recollection on that I will let you re-examine your letter of that date in which you refer to the telephone call of that date, so you strengthen your memory as to the dates.

A. Yes, that is correct.

Q. He did in fact call you November 16th?

A. He did.

(Testimony of Ira B. Joralemon.)

Q. And you recall there were two matters which were discussed on that day, number one is he wanted the drill logs? A. Yes.

Q. And number two, he expressed dissatisfaction as to the money which had been sent to him?

A. That is true.

Q. You at that time told him: "Well, Greenway, that is a matter for our lawyers to take care of"? A. Yes.

Q. And, "I can't pass judgment on whether we owe you anything or not," right?

A. That is right.

Q. As a matter of fact, you had left the matter of the apportionment of funds up to your attorneys?

A. Entirely.

Q. And when I say your attorneys, in particular Mr. Driscoll? [47] A. Yes, sir.

Q. It was his job to read the contract and decide what, if any, amount of money Greenway Albert had coming, that was Mr. Driscoll's job?

A. I would assume so.

Q. In doing it he would be doing it on your behalf and on behalf of Homestake. You did know at that time that Mr. Albert did claim that a failure on the part of you and your principal to comply with the terms of the contract with respect to the payment of money to him?

A. I knew he disagreed with the settlement.

Q. All right. You told Mr. Dolph that had you known something more had to be done to terminate this claim, you stood ready, willing and able to see

(Testimony of Ira B. Joralemon.)

it was done at any time? A. Surely.

Q. You knew there was a conflict about the money. Tell the Court what you did to the end that conflict be resolved, what did you do after Mr. Albert told you there was a conflict?

Mr. Dolph: I object on the ground the question is very confusing and there is an inference in it that Mr. Joralemon knew that they took the position that if the statement wasn't made there was no termination; that is contrary to what he has testified.

The Court: No, he may answer this as to what he did, [48] if anything, about settling the dispute about the money.

Q. (By Mr. McCarty): What did you do about settling the dispute about the money, if anything?

A. I did nothing. I left that up to the lawyers.

Q. Did you call Mr. Driscoll and tell him that Mr. Albert was dissatisfied?

A. I think I telephoned either Mr. Hamilton or Mr. Driscoll directly. Mr. Driscoll was traveling a lot of the time and hard to get. It may have been Mr. Hamilton.

Q. You mean about the same time?

A. About the same time.

Q. This letter that Mr. Conner wrote to Mr. Driscoll which is in evidence, you said you had seen that letter at some later date?

A. At some later date, that is correct.

Q. Was that after this letter of April that

(Testimony of Ira B. Joralemon.)

graphically called it to your attention there was some conflict in the deal?

A. It was after that. I don't remember when.

Q. This was pretty late in the matter you first saw this letter? A. It was.

Q. Did you ever see Mr. Driscoll's reply to it?

A. I don't think so.

Q. Let me ask you this, Mr. Joralemon, at any time after [49] your discussion—first I will ask you this, at any time after your letter of November 5, 1956, in which you gave notice of your intention to surrender or your notice of surrender, whatever the case may be, at any time after that time, what, if anything, did you do to bring about a revocation of the contract other than calling Mr. Hamilton and asking that the deed be sent and the money be transmitted, did you ever after that time do anything at all?

A. I did not. I assumed nothing else was necessary.

Q. You of course relied on Mr. Hamilton to get the deed out and relied on your attorneys to get the proper amount of cash down here?

A. That is correct.

Q. I suppose you were somewhat astounded when you got Mr. Conner's letter of April 16th calling your attention to the fact that no deed had ever been sent?

A. I was very much surprised that Greenway Albert had not let me know of it earlier.

(Testimony of Ira B. Joralemon.)

Q. Were you surprised the secretary of Homestake Corporation hadn't let you know?

A. Yes, I was surprised I had heard nothing about it from anybody.

Q. Were you surprised that your attorney hadn't told you about the conflict with respect to the money?

A. No. That wasn't my business, that was their business. [50]

Q. Were you aware of the fact they had written a letter early in January acknowledging their mistake with respect to the money?

A. I did not know that.

(Defendants' Exhibit C marked for identification.)

Q. (By Mr. McCarty): Look at this C for identification. I think you recognize the letterhead of the Homestake Mining Company?

A. That looks like it.

Q. Would you take that to be the valid signature of Mr. Hamilton by his representative?

A. It looks like it.

Mr. McCarty: We will offer that into evidence. Do you object, gentlemen?

Mr. Dolph: I don't see any materiality. We have no objection to the exhibit.

The Court: It may be received.

(Defendants' Exhibit C marked in evidence.)

(Testimony of Ira B. Joralemon.)

DEFENDANTS' EXHIBIT C

Homestake Mining Company
100 Bush Street
San Francisco 4, California

January 4, 1957.

Mr. H. Greenway Albert,
P. O. Box 246,
Tombstone, Arizona.

Subject: Project—Greenway Albert

Dear Mr. Albert:

Enclosed is our check no. 12-126, in the amount of \$1,286.52, payable to H. Greenway Albert or Maja Greenway Albert.

This check is in addition to our payment dated November 6, 1956, check no. 11-5 in the amount of \$3,932.15, and covers an error made in computation.

Sincerely yours,

/s/ J. W. H.,

JOHN W. HAMILTON,
Secretary.

By /s/ M. A. MASON.

JWH:mam:js

encl.

Admitted in evidence February 21, 1958.

(Testimony of Ira B. Joralemon.)

Q. (By Mr. McCarty): This letter of January 4, 1957, addressed to Mr. Albert here, coming out of Mr. Hamilton's office, refers to the fact it encloses a check in the sum of \$1,286.52, and says that it covers an error made in the computation. Did anybody at any time ever tell you about that error in computation?

A. They did not, not until after this question come up [51] in April or May.

Q. Did anybody ever bother to tell you Mr. Greenway Albert was not paid all of the quarterly payment, either according to your own views, until January of the next year?

A. Not until long afterward.

Q. Not until the dispute was crystallized by Mr. Conner's letter of April 16th; you never answered Mr. Conner's letter of April 16th?

A. I did not.

Q. As a matter of fact, a month later you got a letter from Mr. Conner, a registered letter in which he asked that you answer?

A. That is correct.

Q. You recall that?

(Defendants' Exhibit D marked for identification.)

Q. (By Mr. McCarty): Mr. Joralemon, as far as this letter of April 16th, which is in evidence now as Plaintiff's Exhibit 7, I think you told us you never answered that letter?

A. That is true.

Q. You recall you got a subsequent letter one

(Testimony of Ira B. Joralemon.)

month later, May 16th, from Mr. Conner suggesting you answer? A. That is correct.

Q. This is Defendants' Exhibit D for identification is your answer to Mr. Conner's letter of April 16th and May 16th, [52] right?

A. That is correct.

Mr. McCarty: We offer that in evidence.

Mr. Dolph: No objection.

The Court: It may be received.

(Defendants' Exhibit D marked in evidence.)

DEFENDANTS' EXHIBIT D

May 21, 1957.

Mr. Charles E. Conner,
509 Valley National Building,
Tucson, Arizona.

Dear Mr. Conner:

In reply to your letters of April 16 and May 16 re "Lease and Option to Purchase," this matter is being handled for us by Mr. Robert E. Driscoll Jr. Mr. Driscoll was to have looked you up in Tucson a week or ten days ago.

Of course we consider that my letter of cancellation of the Lease and Option from H. Greenway Albert was valid. Therefore we are convinced that no other payments are due to Mr. Albert.

If Mr. Driscoll has been unavoidably delayed and has not gotten in touch with you before now, he will certainly do so very shortly.

(Testimony of Ira B. Joralemon.)

Yours very truly,

/s/ IRA B. JORALEMON.

IBJ:B

cc: Dr. Donald H. McLaughlin

Mr. R. E. Driscoll Jr.

Admitted in evidence February 21, 1958.

Q. (By Mr. McCarty): I notice in here you refer to the fact that you thought Mr. Driscoll was to have seen Mr. Conner at a previous date, so from that I would assume after you received Mr. Conner's letter of April 16th you contacted, among other people, Mr. Driscoll?

A. Either Mr. Hamilton or Mr. Driscoll.

Q. Certainly before you wrote that letter someone had told you that Mr. Driscoll was going to contact Mr. Conner? A. I would think so.

Q. Do you recall how soon after the receipt of the letter you contacted Mr. Hamilton or Mr. Driscoll? A. Very shortly.

Q. A matter of a few days? A. Few days.

Q. Incidentally, to completely break our chain of thought, was that letter of November 5 either registered or certified?

A. I don't know. I left that to my secretary. I don't know what she did with it. [53]

Q. Does she customarily show on the face of her letters whether or not they are to be registered or

(Testimony of Ira B. Joralemon.)

certified? A. Not always, no.

Q. You have no way of knowing at this date whether it was?

A. I have no way of knowing.

Q. With respect to the institution of this suit we are here on now, Mr. Joralemon, have you ever read the complaint in the case?

A. I don't think so, not in detail.

Q. You probably do remember that sometime toward the latter part of May you were requested to sign a quitclaim deed by your attorneys?

A. That is correct.

Q. Where was that done, here or in San Francisco? A. In San Francisco.

Q. Did you come down here at all on the deal?

A. Not at that time.

Q. Your attorneys had you execute a quitclaim deed, and that was the latter part of May, right?

A. Approximately.

Q. I will tell you in the complaint there are references to letters that were mailed to Mr. Bilby's office, moneys that were deposited with the Valley National Bank, deeds that were served, and so on, that was all left in the hands [54] of your attorneys, I take it? A. That is true.

Q. Mr. Driscoll, and through him this Tuscon law firm? A. Right.

Mr. McCarty: I have no further questions.

(Testimony of Ira B. Joralemon.)

Redirect Examination

By Mr. Dolph:

Q. Mr. Joralemon, how long have you known Mr. Albert?

Mr. McCarty: I object on the ground it is immaterial.

Mr. Dolph: It is not immaterial, your Honor. There is a question of estoppel here and a question of whether Mr. Joralemon was entitled to rely upon Mr. Albert's failure to make a demand.

The Court: I will let him answer.

A. Since approximately 1912.

Q. (By Mr. Dolph): Are you personal friends as well as business acquaintances? A. Yes.

Mr. Dolph: That is all.

Mr. McCarty: That is all.

ROBERT E. DRISCOLL, JR.

called as a witness herein, having been first duly sworn, [55] testified as follows:

Direct Examination

By Mr. Dolph:

Q. What is your full name and what is your business or profession?

A. Robert E. Driscoll, Jr. I am an attorney.

Q. Where? A. Lead, South Dakota.

Q. You have heard Mr. Joralemon's testimony here. Were you acting as an attorney and as attor-

(Testimony of Robert E. Driscoll, Jr.)

ney for his partner or grubstake contractor at the time this was all going on?

A. I was, yes, sir.

Q. On or about April 28th, 1956, did you come to Tucson, Arizona?

A. That is approximately the date, yes.

Q. I hand you Exhibit 1 in evidence. Do you recognize that?

A. I have seen it before, yes.

Q. You had seen it before you came here on April 28th, is that correct?

A. I either saw this or a copy.

Q. What was the purpose of your coming here at that time?

A. I came down with the idea of talking with Mr. Albert's [56] attorney about the various title problems and also to formalize this memorandum.

Q. Did you get to talk to Mr. Albert's attorney?

A. I did, yes.

Q. Who was that? A. Mr. Conner.

Q. You discussed the matter of the title defects with him? A. I did.

Q. Did you have any kind of an understanding as to the preparation of any further agreement or supplement to agreement to Exhibit 1 in evidence?

A. This was a Saturday morning——

Mr. McCarty: Just a moment, please. I am not going to object to his telling what they did, but I object to any agreement to make an agreement. We have a parol evidence rule. I don't have any objection at all if the witness tells us what happened.

(Testimony of Robert E. Driscoll, Jr.)

Mr. Dolph: He was asked if he had an understanding.

The Court: He may answer.

Mr. McCarty: I didn't want to get a parol agreement in here.

The Witness: I will try to avoid that.

I met with him and we discussed the various ramifications, title-wise, and he couldn't work Saturday afternoon, and as I [57] recall, he was going to be gone Monday. I told him I would prepare and try to find a public secretary to type up my proposal for the memorandum agreement. I went back to my hotel room and drew this agreement that afternoon in longhand. I was unable to find a secretary.

(Plaintiff's Exhibit 8 marked for identification.)

Q. (By Mr. Dolph): I hand you Exhibit 8 for identification and ask you if that is what you prepared? A. That is what I prepared, yes.

Q. Did you turn that over to Mr. Conner?

A. I either mailed it or went up and dropped it in his office door, yes.

(Plaintiff's Exhibit 9 marked for identification.)

Q. (By Mr. Dolph): I hand you Exhibit 9 for identification and ask you if you recognize that?

A. That was my handwritten letter that accompanied the agreement, yes.

Q. You left both of those at Mr. Conner's office?

(Testimony of Robert E. Driscoll, Jr.)

A. I either mailed them or left them, I don't recall which.

Mr. Dolph: I offer 8 and 9 in evidence.

Mr. McCarty: 8 is the suggested memo?

Mr. Dolph: Yes, and 9 is the letter.

Mr. McCarty: I have no objection to either.

The Court: Plaintiff's Exhibits 8 and 9 in evidence. [58]

(Plaintiff's Exhibits 8 and 9 marked in evidence.)

Q. (By Mr. Dolph): Subsequent to that, did Mr. Conner contact you or confer with you regarding the subject matter of Exhibit 8 in evidence?

A. No, he then prepared a typed instrument somewhat along the lines there with some rather major changes. He sent out a copy I recall to Mr. Joralemon and sent a copy to my office, but I was in the field and it was sometime before I read it. But Mr. Conner did prepare an agreement that was ultimately executed.

Q. I hand you Exhibit 2 in evidence and ask you if that is the agreement Mr. Conner prepared?

A. Yes, that is it.

Q. Did he confer with you about any changes between Exhibit 8 and Exhibit 2, before Exhibit 2 was executed? A. He did not.

Q. I hand you Exhibit 6 in evidence and ask you if you ever saw that, Mr. Conner's letter to you?

Mr. McCarty: I object on the ground it is im-

(Testimony of Robert E. Driscoll, Jr.)

material as to whether or not he saw that letter to him. I am interested in knowing whether or not he received it, but I think it is wholly immaterial. Are they trying to set aside an agreement here? I don't know what their point is in all this.

The Court: I am going to let him answer. I don't know what it is leading up to but I can tell better when we [59] get a little further.

A. Yes, it is a letter addressed to me by Mr. Conner that I received.

Q. (By Mr. Dolph): Did you answer the letter?
A. As I recall, I did.

(Plaintiff's Exhibit 10 marked for identification.)

Q. (By Mr. Dolph): I hand you Plaintiff's Exhibit 10 for identification and ask you if that is your response to Mr. Conner's letter of November 21st?
A. It is.

Mr. Dolph: I offer 10 in evidence.

Mr. McCarty: I have no objection at all, save and except the objection with reference to the parol evidence rule. I make that limited objection, that the Court receive it subject to my objection insofar as it bears to the parol evidence rule. There is some reference in there to a telephone conversation with respect to the \$4,000 payment, but the Court has indicated he will not hear parol evidence on it.

Mr. Dolph: Let us stipulate that no parol evidence from either side will be received. I am willing to do that.

(Testimony of Robert E. Driscoll, Jr.)

The Court: You don't need to stipulate, I am not going to do it anyway in view of counsel's agreement that it is ambiguous.

Mr. Dolph: I offer it subject to that limitation. [60]

The Court: It may be received with that limitation.

(Plaintiff's Exhibit 10 marked in evidence.)

PLAINTIFF'S EXHIBIT No. 10

Kellar & Kellar & Driscoll

Attorneys at Law

Lead, South Dakota

November 26, 1956

Mr. Charles E. Conner,
Attorney at Law,
P. O. Box 310,
509-514 Valley National Building,
Tucson, Arizona,

Re: Homestake Mining Company—

H. Greenway Albert

Dear Sir:

I have your letter of November 21st re the above-captioned matter. Said letter has been referred to Mr. John Hamilton of the Homestake Mining Company, 100 Bush Street, San Francisco 4, California, who made the computations as to the amount due Mr. Albert.

(Testimony of Robert E. Driscoll, Jr.)

I would like to state that insofar as the writer is concerned, it was not distinctly understood that the \$4,000 settlement cost was not to be charged against Mr. Albert. To the contrary, it was and is my understanding and opinion that said payment was a part of the legal cost of clearing up title to Mr. Albert's property, to be deducted on a pro rata basis for a year's payment as they became due, pursuant to the terms of the contract. There may have been such an understanding amongst others who negotiated and worked on this agreement that I know nothing about, but this will have to be checked.

Also, the writer has had to assume the blunt of the blame for allowing the execution of the contract contrary to the basic original intent insofar as the requirement of the first quarterly payment of \$7,000 was concerned. The intent as set forth in the initial memorandums would have allowed cancellation of the option prior to such payment. The drafts you sent to Mr. Joralemon for signature provided for a 90-day notice prior to cancellation. This blame may be mine to assume, but to check my recollection on it, I would appreciate your sending me by return mail the tentative instrument I prepared in long hand on yellow legal pad paper and left with you when I was in Tucson some months ago. In the alternative, I would appreciate it if you would send me a true copy of said instrument.

(Testimony of Robert E. Driscoll, Jr.)

You will no doubt be hearing from San Francisco either direct or through this office in the near future.

Very truly yours,

/s/ R. E. DRISCOLL, JR.

RED:d

Admitted in evidence February 21, 1958.

Mr. Dolph: We have no further questions.

Cross-Examination

By Mr. McCarty:

Q. Mr. Driscoll, did you by any chance bring your correspondence file down here with you?

A. I have some of it, yes.

Q. Where is the part of it you don't have?

A. It is mixed up between my file and the file of Mr. Bilby.

Q. Would it be a great deal of trouble now for you to go get your correspondence file, please?

(Defendants' Exhibit E marked for identification.)

Q. (By Mr. McCarty): Now, marked for identification, Exhibit E, is a copy of a letter which purports to have been sent by Mr. Conner to you under date of May 16, 1956, in which he states he is enclosing a copy of a memorandum agreement,

(Testimony of Robert E. Driscoll, Jr.)

which it is my understanding is that agreement you have already seen. Do you have the original of that in your file?

A. I am not sure, but to save time I will admit I got this letter.

Q. You don't know whether you have the original in your file? [61]

A. I am not sure. I know I received that letter with the proposed agreement. It was on my desk when I got back.

Mr. McCarty: I offer that into evidence.

Mr. Dolph: No objection.

The Court: It may be received as E in evidence.

(Defendants' Exhibit E marked in evidence.)

DEFENDANTS' EXHIBIT E

May 16, 1956.

Mr. R. E. Driscoll, Jr.,
Kellar, Kellar & Driscoll,
Attorneys at Law,
215 West Main Street,
Lead, South Dakota.

Dear Mr. Driscoll:

We are enclosing you herewith a copy of the Memorandum Agreement and a copy of our letter to Mr. Joralemon.

Trusting that you will find the enclosed agreement in order, we are,

(Testimony of Robert E. Driscoll, Jr.)

Yours very truly,

CONNER & JONES,

By.....

CEC/vsb

Enclosures

Admitted in evidence February 21, 1958.

Q. (By Mr. McCarty): I have in my file before me, Mr. Driscoll—and it contains Mr. Conner's correspondence file—and according to my file the next letter you wrote to Mr. Conner is dated May 29th, 1956. A. Yes.

Q. I wonder if you have any record of having written one before that day?

A. May 21st, 1956.

Q. May 29th is the date of this letter. My question is, specifically, if you have any record of any correspondence between you and Mr. Conner between May 16 and May 29? First, let me ask you, did you answer that letter of May 16th?

A. I don't recall. That is what I am trying to find out. Yes, I have a copy of a letter I wrote to Mr. Conner on May 29th.

Q. That is the next correspondence from you to him, right? This original I have marked F for identification, is that the original? [62]

A. Yes.

(Testimony of Robert E. Driscoll, Jr.)

DEFENDANTS' EXHIBIT F

Kellar & Kellar & Driscoll
Attorneys at Law
Lead, South Dakota

May 29, 1956.

Mr. Charles E. Conner,
Attorney at Law,
Box 310,
Tucson, Arizona.

Dear Mr. Conner:

Sometime ago when we were discussing a quiet title action on property recently acquired by Mr. Joralemon from the Alberts, I wrote asking if you could ascertain whether the ground was open ground.

I have not as yet heard from you and thought I would jog your memory as to this.

We would also like to be posted from time to time as to progress of the quiet title action.

Very truly yours,

/s/ R. E. DRISCOLL, JR.

RED:d

[Written in pencil at foot of letter]: Not open for location.

Marked for identification February 21, 1958.

(Testimony of Robert E. Driscoll, Jr.)

Mr. McCarty: I offer it in evidence.

Mr. Dolph: May we see it?

Mr. McCarty: Oh, yes.

Mr. Dolph: I object to the materiality.

The Court: May I see it, please?

Mr. McCarty: Before your Honor takes a look at it, I wonder if your Honor would like to hear the theory upon which I am offering it?

The Court: If I see the letter I may be able to follow your theory.

Mr. McCarty: They asked Mr. Driscoll some questions awhile ago whether or not Mr. Conner had consulted with him before he prepared the memo of May 21 or 16th, whatever it is, and whether or not he made substantial changes without consulting him. And I rather got a strong inference they were attempting to show that Mr. Conner had, without consulting Mr. Driscoll, gone out and made an entirely different deal for the people. That was the inference I thought they might be trying to get across to the Court. I thought the Court might be interested in seeing that as far as the correspondence is concerned, there was no remonstrance ever made about it.

Mr. Dolph: That is not material for that.

Mr. McCarty: As long as the Court didn't get the [63] inference, I agree it isn't material.

The Court: The objection is sustained.

Q. (By Mr. McCarty): Mr. Driscoll, when you came down here first to see Mr. Conner May 28th, you recall you left in his hands a draft of a lease

(Testimony of Robert E. Driscoll, Jr.)

and option to purchase, which you had prepared, that being a thing which you were called upon to prepare with some frequency, do you recall that?

A. As I recall, my first visit here a Mr. Paul Henshaw, one of our geologists, was along, and an instrument which had been prepared by other counsel and myself was presented to Mr. Conner, as I remember.

Q. That was the 28th of April when that was done? A. I think so, yes.

Q. As a matter of fact, your handwritten letter of that day will probably help you refresh your recollection, if you will read the last sentence of the third paragraph. A. Yes, I remember that.

Q. You remember leaving a draft you had prepared?

A. That is the longhand draft I left.

Q. No. Read the paragraph again.

A. You want me to read it aloud?

Q. Would you, please.

A. This letter was attached to my longhand memorandum agreement, it said: "If you desire any major changes I [64] would appreciate your calling me at my office in Lead Monday. Also after you have had a chance to digest the principal contract, I would appreciate hearing from you with comment."

Q. What did you mean by "principal contract?"

A. I think I meant that one.

Q. That was what I was asking you about.

A. That was the one that was prepared in San

(Testimony of Robert E. Driscoll, Jr.)

Francisco that we had to change because of the title problems.

(Defendants' Exhibit G marked for identification.)

(Defendants' Exhibit F marked for identification.)

Q. (By Mr. McCarty): Does that look like what you left with him, is that your handwriting on the face of it? A. No.

Q. Do you know whose it is?

A. I think it is Paul Henshaw's.

Q. Do you think that is what you left with Mr. Conner to digest?

A. I wouldn't be surprised. I know we left an instrument, I think this is probably it. If you say so it is.

Q. I don't know. I strongly believe it to be, but I wasn't there.

A. Yes, this instrument was prepared in San Francisco by other counsel and I saw it the first time on that day and we left a copy of it with Mr. Conner.

Mr. McCarty: I offer it in evidence. [65]

Mr. Dolph: May I ask the witness a question concerning this? Was this instrument ever signed?

The Witness: No.

Mr. Dolph: We object to it upon the ground it is immaterial, your Honor.

The Court: What is the purpose of it, Mr. McCarty?

(Testimony of Robert E. Driscoll, Jr.)

Mr. McCarty: If the Court has any question concerning the latter ambiguity that I referred to with respect to the two cancellation provisions in the contract, I think the Court might have received some assistance from the historic preparation of the instrument in its final form. I don't think that will give the Court any trouble, but in excess of caution I thought I would put it all before the Court.

The Court: I had the view there is an ambiguity between 3 and 13.

Mr. McCarty: That is the ambiguity I am referring to and I believe the historical preparation of the documents from one to the last one will shed some light upon it, which will assist the Court in his interpretation of it.

The Court: I don't know whether this document will be—for that purpose I will receive it, for whatever help it may give in resolving the ambiguity. It will be considered only for that purpose.

Mr. McCarty: That is the only purpose I have in offering it. [66]

(Defendants' Exhibit G marked in evidence.)

Q. (By Mr. McCarty): You recall after you were down here in April and talked to Mr. Conner, that thereafter a quiet title action was instituted against the Uranium people? A. Yes.

Q. I believe that you remember the matter was settled about the middle of August? A. Yes.

Q. And a check issued out of the Homestake

(Testimony of Robert E. Driscoll, Jr.)

office in Lead, South Dakota, payable to the order of Conner and Jones in the sum of \$4,000?

A. Yes.

Q. I will show you the voucher I have here of the thing which will probably help you out with respect to the date. I will mark it in evidence if you want it marked.

A. August 17th.

Q. August 17th is the true date, right?

A. Yes.

Q. On that date the settlement funds were transmitted to Conner and Jones in Tucson?

A. Yes.

Q. Can you tell now from your file when you prepared a lease and option to purchase embodying what you thought should be the final agreement between these people? Have you any way of telling when that was prepared by you? [67]

A. The first instrument that just went into evidence was prepared in San Francisco. The memorandum agreement, the next memorandum agreement was prepared by Mr. Conner——

Q. Now——

A. Just a minute, I am not through.

Q. You are referring to the one of May?

A. Right.

Q. Right.

A. The next agreement was prepared here I believe after Mr. Joralemon came down and had a further conference with Mr.——

Q. Down here, meaning where?

A. Down to Tucson.

(Testimony of Robert E. Driscoll, Jr.)

Q. You say the next one was prepared down here?

A. Yes, it was prepared in Tucson.

Q. By whom? A. That I don't know.

Mr. McCarty: Can you help me on that?

Mr. Joralemon: Mr. Albert agreed on changes in the May agreement and it was copied in.

The Witness: I have it on good authority Mr. Conner prepared it.

Q. (By Mr. McCarty): Check your correspondence file and see if you find a letter from you to Conner dated August 25th.

A. August 25th? [68]

Q. Yes.

(Defendants' Exhibit H marked for identification.)

Q. (By Mr. McCarty): Mr. Driscoll, as a matter of fact, you sent a proposed agreement to Mr. Conner August 25, 1956, right? A. Yes.

Q. I think you will be the first one to tell the Court that this document, which is Plaintiff's Exhibit 3 in evidence, was typed in your office by your typewriter—that is a rather distinctive type you people use up there, isn't it?

A. We have so many I don't know.

Q. Compare it, for instance, with your letter, with your signature on it and see if that assists you?

A. Yes. This is the one that took out the 90-day

(Testimony of Robert E. Driscoll, Jr.)

cancellation clause. That was apparently prepared up there.

Q. For instance, take a look at this photostat I have here.

(Defendants' Exhibit I marked for identification.)

Q. Is there any way of telling from your file whether this Defendants' Exhibit I for identification is a copy of the draft you sent to Conner August 25th?

A. Yes, I think this is a copy of it.

Q. You haven't any doubt that is a photostat of an instrument prepared in your office?

A. I think that is right. [69]

Q. That typing is pretty distinctive, isn't it?

A. I am pretty sure it is right.

Mr. McCarty: We offer that in evidence. If you would like, I can use the one we had on deposition. I wonder if I might withdraw this document marked Defendants' Exhibit I and substitute a typed copy with the same marking?

The Court: Very well.

Mr. McCarty: This will probably be a little easier to handle.

The Witness: Yes.

Q. (By Mr. McCarty): You believe that to be a copy of the document you sent to Mr. Conner?

A. I believe so.

Mr. McCarty: We offer it in evidence.

(Testimony of Robert E. Driscoll, Jr.)

Mr. Dolph: We object to it on the grounds it is immaterial, your Honor.

Mr. McCarty: I have the same limited purpose in mind, if the Court please.

The Court: Does this have the 3 and the 13 in it as it was finally signed?

While you are looking at that we will take the noon recess, Mr. McCarty, until 1:30.

(Noon recess.) [70]

After Recess—1:30 o'Clock P.M.

Mr. McCarty: I believe I have offered this into evidence. This is Defendants' Exhibit I for identification, it being the contract that Mr. Driscoll has identified the one as being sent to Mr. Conner August 25th.

The Witness: I would like to examine that a moment, if I may.

Mr. McCarty: All right, sir.

The Court: Is that I for identification?

Mr. McCarty: Yes, sir.

Mr. Dolph: Our objection is to the materiality of it, your Honor.

The Court: May I see it a moment, please?

Mr. McCarty: I think a chronological sequence of the appearance of these documents would be of some assistance to the Court, in connection with the ambiguity which the Court has indicated he believes exists.

The Court: It will be received. I can't deter-

(Testimony of Robert E. Driscoll, Jr.)

mine now if it will be of any aid in resolving or helping me with the ambiguity I see in the agreement, but it will be disregarded in the event it doesn't.

(Defendants' Exhibit I marked in evidence.)

Q. (By Mr. McCarty): Mr. Driscoll, do you now recall that sometime early in September of the year 1956 Mr. Joralemon came [71] to Tucson, Arizona, for the purpose of discussing this?

A. Yes. I am not sure as to the date, but I know he did come down.

Q. I can call Mr. Joralemon back if necessary to verify the fact—perhaps you remember his testimony on deposition.

(Defendants' Exhibit J marked for identification.)

Q. (By Mr. McCarty): You recall his testifying on deposition he was here September 11th and talked to Mr. Greenway Albert? A. Yes.

Q. And they went over a draft of the lease?

A. Yes.

Q. He testified that in fact that handwriting on top of that exhibit is he and Mr. Joralemon's handwriting? A. Yes.

Q. You recall his testimony in that regard?

A. Yes.

Q. I wonder if you would look at your file and see if you have any record of having transmitted that draft to Mr. Joralemon sometime the latter part of August, or early part of September?

(Testimony of Robert E. Driscoll, Jr.)

A. I do have a letter addressed to Mr. Paul Henshaw, interoffice communication, sending an original and four copies.

Mr. McCarty: Let's mark that for identification.

(Defendants' Exhibit K marked for identification.) [72]

The Witness: Let me look at that.

Mr. McCarty: Would you, please.

Now I will offer this Defendants' Exhibit J into evidence.

Mr. Dolph: We object to it on the grounds of materiality and no proper foundation has been laid.

The Court: I didn't get that this witness had identified it.

Mr. McCarty: He recalls Mr. Joralemon having identified it. I can tell you that I will call Mr. Joralemon back and I will put him back on the stand for that purpose. That is his handwriting on it?

A. Yes, it is.

Mr. McCarty: I will call Mr. Joralemon back.

Q. (By Mr. McCarty): This memorandum to Mr. Henshaw, Mr. Henshaw is in the San Francisco office?

A. Yes.

Q. What is he, an attorney?

A. No, he is a geologist.

Q. You said enclosed is an original and four copies of the agreement. "I checked this with Joralemon by telephone, he stated it is in order." Assuming it to be the fact, which I think you have

(Testimony of Robert E. Driscoll, Jr.)

testified you know to be a fact, Mr. Joralemon and Mr. Albert had discussed the matter in Tucson?

A. Yes. [73]

Q. I would assume following the discussion you received some sort of telephone call from Mr. Joralemon?

A. And the discussion was on cancellation clause with a payment—somebody told me what they had decided to do, yes.

Q. I notice some notes were made on that. Somehow that came to your attention after their person to person talk? A. Yes, it did.

Q. Judging from the dates, I would say you immediately sat down and got the thing in final form within two days and had it in the mail to San Francisco?

A. It would be my assumption.

Q. I notice the executed agreement which is in evidence was executed by the Greenway Alberts here in Tucson the 21st day of September, which would indicate it was forwarded very shortly out of the San Francisco office to Tucson. That date is the 13th of September; it was executed the 21st of September?

A. What was the date of the meeting of Mr. Joralemon with Mr. Albert?

Q. 11th. That would seem to follow?

A. Yes.

Q. This document which was actually executed by the parties is no doubt one of the copies which

(Testimony of Robert E. Driscoll, Jr.)

was mailed out of your office with your letter of September 13th?

The Court: You are referring to 3? [74]

The Witness: I am referring to Plaintiff's Exhibit 3, yes, sir.

What was that question?

Q. (By Mr. McCarty): I said that document is one of the documents referred to in this Defendants' Exhibit K for identification?

A. That is not our typing that you refer to as being so distinctive, so I doubt that particular copy came out of my office.

Q. You want the Court to believe they executed a copy you did not prepare?

Mr. Dolph: I object to that.

The Court: Objection sustained.

The Witness: This is undoubtedly a copy of the agreement, but I don't think that particular one came out of my office.

Q. (By Mr. McCarty): Do you suppose they could have retyped it in San Francisco?

A. They may have.

Q. Do you have any way of knowing that is an identical copy of one of the instruments you referred to in your memorandum of September 13th?

A. Let me have—that is it.

Q. What I claim to have Mr. Joralemon's handwriting?

The Court: This I? [75]

The Witness: That is it, sir. I don't know.

Q. (By Mr. McCarty): You have no way of

(Testimony of Robert E. Driscoll, Jr.)

telling the Court whether or not this executed contract, Plaintiff's Exhibit 3 is in fact a copy of the contract which you mailed to Mr. Henshaw September 13th?

A. I don't know for sure. It probably is, but I don't know.

Q. That would certainly seem to be a reasonable presumption in the light of the fact Mr. Joralemon signed it? A. Yes, it would.

Mr. McCarty: I offer into evidence the memo of September 13th, if the Court please.

Mr. Dolph: The only objection is to the materiality of it.

The Court: May I see it? It may be received.

(Defendants' Exhibit K marked in evidence.)

DEFENDANTS' EXHIBIT K

Homestake Mining Company
Correspondence—Inter-office

To: Paul C. Henshaw.

From: Kellar & Kellar & Driscoll.

Date: September 13, 1956.

Dear Paul:

Enclosed herewith original and four copies of proposed agreement with Alberts. I checked this with Joralemon by telephone last night, and he stated that it was in order, but I would appreciate you carefully going over the contract and discus-

(Testimony of Robert E. Driscoll, Jr.)

sing it with Mr. Joralemon if you have any questions.

Mr. Joralemon stated that he would be back in San Francisco Friday and in his office Saturday morning, and would then be gone for awhile, and I am therefore sending this airmail special with the hope that you can catch him before he leaves.

I have not sent a copy of this to Conner, and do not intend to do so until this has been approved by you people out there. Suggest the possibility after your approval of sending executed copies directly to him.

Best regards.

Very truly yours,

R. E. DRISCOLL, JR.

RED:d

Admitted in evidence February 21, 1958.

Q. (By Mr. McCarty): Mr. Driscoll, I believe you told the Court in your talk with Mr. Joralemon the chief topic of your discussion was the right to terminate the lease and the provisions in the contract in that regard, right? A. Yes, sir.

Q. The memorandum of May 16th which Mr. Conner has prepared and which Mr. Joralemon knows he signed in San Francisco five or six days after the date on it, that provided for a ninety-day

(Testimony of Robert E. Driscoll, Jr.)

notice? [76] A. Yes, sir.

Q. No doubt you are aware of the fact that a quarterly payment of \$7,000 was going to come due every three months? A. Yes.

Q. I believe you objected to the inclusion in that contract of that ninety-day notice, right?

A. It was signed up before I got to it, yes, and I did object to it strenuously.

Q. At the time you intended to put the thing into final form, I believe it was suggested to you by way of compromise that ninety-day clause be deleted from the contract and that in lieu thereof the contract provide it could not be terminated until the first quarterly payment had been made?

A. That is right.

Q. As a matter of fact, Mr. Joralemon instructed you to prepare along those lines, to delete the ninety-day clause and insert in lieu thereof a provision that the right of cancellation couldn't be exercised until the first quarterly payment of \$7,000 had been made?

A. That I never put into any of the drafts I sent forward.

Q. Did you ever see that in any draft?

A. Not until the final execution after Mr. Joralemon's trip over here.

Q. Your testimony is you never did see the draft Mr. Joralemon executed? [77]

A. I don't believe so, I mean until after it was executed.

(Testimony of Robert E. Driscoll, Jr.)

Q. What did you mail out of your office May 13th?

A. They were in a big dispute about this particular feature and I apparently had some copies made deleting the ninety-day clause.

Q. Putting what in lieu of it?

A. I don't recall.

Q. A \$7,000 payment to be made?

A. No. That was done down here, I tried to tell you that.

Q. Your testimony is you sent to San Francisco the 13th, you have no idea where they are or provide in that regard and you can't tell the Court what is in it?

The Court: You referred to that awhile ago as May 13th; you mean September 13th?

Mr. McCarty: September 13th, I am sorry.

A. I just don't recall.

Q. (By Mr. McCarty): You know that some eight days later the contract was here in Tucson and executed by the Alberts, some contract?

A. Was it executed at the time Mr. Joralemon was over here?

Q. I doubt it, now that you ask me. He was here the 11th. Did anyone at any time ever mention to you the fact that that first quarterly payment would have to be made? [78]

A. To cancel, yes.

Q. Who mentioned that to you, Mr. Joralemon?

A. In the first instance I don't believe so.

(Testimony of Robert E. Driscoll, Jr.)

Q. Prior to the execution of the contract, did Mr. Joralemon ever discuss that with you?

A. Execution of the final contract?

Q. Yes.

A. Somebody did. They told me they compromised it out by assuring the first payment would be made.

Q. As far as the intention of the people you represent was concerned, did you ever have any doubt it was their intention to include such a provision in the contract as a condition to the right to cancellation?

A. Would you repeat that question?

Q. By the time this thing got ready to sign, did you have any doubt at all with regard to the intention of your clients that the payment of the \$7,000, subject to appropriate adjustments, was a condition precedent to the right to terminate?

A. It is not in that.

Q. You say it is not in this?

A. The payment of the first quarterly——

Q. Yes.

A. The first quarterly payment, yes, that is correct.

Q. That was made a condition precedent? [79]

A. That was made a condition to the——

Q. To the right to cancel?

A. To the right to cancel.

Q. As far as you knew——

Mr. Bilby: Just a minute now. We object to these conclusions. That is purely a legal conclusion.

(Testimony of Robert E. Driscoll, Jr.)

He can tell what is in the contract, not what its conditions precedent to the right to cancel. I don't believe the witness means to testify to any such thing.

The Witness: As I understand it, the payment of the first quartely \$7,000 due——

Q. (By Mr. McCarty): Yes, sir.

A. ——had to be made before Mr. Joralemon could back away from this contract.

Q. You never had any doubt in your mind about that did you? A. No.

Q. As far as you know that was certainly Mr. Joralemon's intentions?

A. Exactly. It was after he got into the row, yes.

Q. I understand that. But I mean when you were getting ready to sign the thing? A. Yes.

Q. That was the precise intention of Mr. Joralemon? A. Right. [80]

Q. You never had the slightest doubt that was his intention or the intention of Homestake working through him, did you?

A. I can't really say what his intention was.

Q. All I can judge by is what he suggested you do, based on the instructions you got.

Mr. Dolph: We object to the form of the question, if the Court please. Let him ask what he was told to do.

The Court: I think the objection is good. It will be sustained.

Q. (By Mr. McCarty): Now getting back to

(Testimony of Robert E. Driscoll, Jr.)

this letter of November 5. You no doubt will recall receiving from Mr. Conner this letter which is now in evidence as Plaintiff's Exhibit 6, I have no doubt you remember that? A. Yes.

Q. And I suppose that you also remember your reply to that letter, which is here in evidence somewhere? A. Yes, I do.

Q. As Plaintiff's Exhibit 10. A. Yes.

Q. You sent that letter and that is your signature of course? A. Yes.

Q. Now, from what Mr. Joralemon has already told us, I take it you were never called upon to [81] exercise any function at all with respect to the preparation of the quitclaim deed referred to?

Mr. Bilby: I can hardly hear you.

The Court: Mr. McCarty, if you will stand back.

Q. (By Mr. McCarty): Nothing was ever said to you with respect to your preparation of the deed, I take it? A. No.

Q. What did you do, Mr. Driscoll, after you got Mr. Conner's letter, other than write him this reply of November 26th which closes with the words: "You will no doubt be hearing from San Francisco either direct or through this office in the near future."

A. I caught an error in the San Francisco computations.

Q. When did you do that?

A. After I got Mr. Conner's letter, then I wrote them about it.

Q. You wrote San Francisco? A. Yes.

(Testimony of Robert E. Driscoll, Jr.)

Q. You never again wrote Mr. Conner?

A. I don't believe so, no.

Q. When did you write San Francisco?

A. It was shortly after I received the letter from Conner.

Q. Why don't you look at your file and see if you can tell us from your documents? [82]

A. What is the date?

Q. The date on this letter you signed is November 26th, 1956.

A. Yes, I wrote this on the 26th.

Q. This would indicate on the same date you wrote Mr. Conner you wrote to Mr. Hamilton in San Francisco, asking him to please——

A. Is it going to be admitted first?

Q. I think that might be desirable.

(Defendant's Exhibit L marked for identification.)

Q. (By Mr. McCarty): This L for identification is an accurate copy of a memo you wrote to Mr. Hamilton in San Francisco November 26th, 1956? A. It is.

Mr. McCarty: We offer it into evidence.

(Defendants' Exhibit L marked in evidence.)

(Testimony of Robert E. Driscoll, Jr.)

DEFENDANTS' EXHIBIT L

Homestake Mining Company
Correspondence—Inter-Office

To: John W. Hamilton

From: Kellar & Kellar & Driscoll

Date: November 26, 1956

Dear John:

I am enclosing letter from Conner and Jones regarding the Greenway Albert matter which is self-explanatory. Also see copy of my reply to him which is also enclosed.

Perhaps if you could tell me how you made your computations and check with Mr. Joralemon or Paul as to the \$4,000 matter, we can answer him again.

Best regards.

Very truly yours,

.....
RED:d

Admitted in evidence February 21, 1958.

Q. (By Mr. McCarty): I would assume that was followed by other correspondence between you and San Francisco as to how the computation was made? A. Yes.

Q. Mr. Joralemon has told us, Mr. Driscoll, as

(Testimony of Robert E. Driscoll, Jr.)

far as the proposition of deciding what moneys were due under the contract, that was placed in your hands, right?

A. At least partially. It was cleared through our accounting department of course. [83]

Q. This provision that is in this contract that is in evidence, that is the main contract between the people, and seeking to trace back this original provision in the contract, to orient you on the thing, I think you will remember the contract recited that there were certain title defects and that they would be cleared and that Mr. Joralemon would pay the legal expense. And then this language which appears on the third page: "Any legal expense incident to the foregoing paid by lessee shall be deducted from future payments to lessors prorated over one year's payments as they become due." Keep that before you, that specific language.

As you can see, Mr. Driscoll, that language is almost identical to your handwritten language contained in this adjusted memorandum which you wrote out in your own hand back April 28th.

Mr. Bilby: Your Honor, don't these agreements speak for themselves?

The Court: I take it this is preliminary.

Mr. McCarty: It is.

The Court: For that purpose it may go in.

A. Approximately the same.

Q. (By Mr. McCarty): Almost identical, isn't it?

A. Yes.

Q. Now, Mr. Driscoll, just assuming for the

(Testimony of Robert E. Driscoll, Jr.)

purposes of argument that you were entitled to some sort of a deduction [84] because of the payment of that \$4,000 in settlement of the lawsuit—I am assuming that for the purposes of the question I am about to ask you. Assuming that to be the fact, the amount which was mailed to Mr. Albert out of your San Francisco office November 6th, which has already been stated to the Court, you will recall, was improper, it was not right, right?

A. Yes, sir.

Q. It was improperly computed under the language of that contract which you in your own hand prepared?

A. Under my interpretation of how it should have been computed it was improper, correct.

Q. Accordingly I have little or no doubt that you so advised San Francisco which caused them to issue their second draft, which was dated the 31st of December?

A. Yes, I believe that was the date.

Q. And it was your advice to San Francisco no doubt that occasioned this letter of December 4—January 4, 1957, which is in evidence. Have you seen that letter? A. Yes.

Q. Still trying to decide what became of this memo of yours of September 13th. You recall, at least I have avowed to you, and I am going to prove Mr. Joralemon was in town September 11th and talked to Mr. Albert about the deal. And do you recall a telephone conversation with Mr. Conner the [85] date of September 12th, which would be

(Testimony of Robert E. Driscoll, Jr.)

the day before you mailed those enclosures to San Francisco, do you remember Mr. Conner calling you on that date?

A. I don't know. I am trying to remember and I may be misinformed because this is going pretty much on what I was told, that that final executed draft was typed up down here and signed down here when all the parties were here. That is my understanding. If I am in error on that I will have to double check.

Q. There is no way at all the documents would be marked so you could see whether or not they ever came out of your office?

A. We have typewriters going—it might have, I just don't know.

Q. There is one page in the agreement that seems to have been typed separately and put in. You notice that page 6, it appears to be substantially different? A. And initialed.

Mr. McCarty: I haven't any further questions.

Redirect Examination

By Mr. Dolph:

Q. Mr. Driscoll, Mr. McCarty asked you your understanding or opinion with regard to certain things connected with this contract and I believe you stated on cross-examination that [86] you never had any doubt that Mr. Joralemon, under the terms of this lease, had to pay that first quarterly payment?

Mr. McCarty: I am sorry, but if I asked that

(Testimony of Robert E. Driscoll, Jr.)

I didn't intend to. I asked any demand, whether that was Mr. Joralemon's intention.

The Court: I think that was the question to which I sustained an objection.

Mr. McCarty: I believe you did.

Mr. Dolph: He went into it, your Honor.

The Court: You did get from him he had no doubt that wasn't required under that contract.

Mr. Dolph: What I was trying to elicit was the fact that that was his instructions in the matter and accurately reflected the intention of his principal, to the best of his knowledge.

The Court: Let's hear it further.

Mr. Dolph: All right.

Q. (By Mr. Dolph): Was it your understanding that your principal had any intention that that provision should mean that no notice of termination could be effective before the legally correct amount had been paid on the quarterly payment?

A. Absolutely.

Mr. McCarty: Just a moment. I object to the leading nature of the question. [87]

Mr. Dolph: Your Honor, he went into this and the only way I can ask the question is to define what I am talking about.

The Court: That is leading, Mr. Dolph.

Q. (By Mr. Dolph): I will ask you this. Would you explain to the Court then, Mr. Driscoll, what your instructions and what your understanding of your principal's intention was in agreeing to that provision?

(Testimony of Robert E. Driscoll, Jr.)

A. Yes. It was a compromise to eliminate this ninety day cancellation clause, but clearly not a condition precedent to termination of this agreement.

Q. And what was your understanding with regard to the provision in that paragraph regarding quitclaim deeds? A. The same answer.

Q. You have testified you received Mr. Conner's letter or at least a copy of it, the one dated April 16th, Exhibit 7 in evidence, I hand it to you. I will ask you to tell the Court what you did in connection with this matter after you received notice of that letter?

A. Well, Mr. Joralemon sent me a copy of this letter, Mr. Conner did not, as I recall. And when I got it I immediately felt that there was only one thing to do and that was engage local counsel down here and find out what it was all about, which we did. I came down here and as you gentlemen recall, we discussed it and felt declaratory [88] judgment action was the only thing to find out.

Q. As far as you know, did Mr. Conner receive a response to that letter through your local counsel?

A. My recollection is that you gentlemen went down to see him within a matter of hours or days at the most.

Q. When you said on cross-examination that you did not reply to that letter, you meant that you personally made no written reply to it?

A. That is right.

Mr. Dolph: That is all.

(Testimony of Robert E. Driscoll, Jr.)

Recross-Examination

By Mr. McCarty:

Q. When did you come down and talk to counsel about it? The suit was filed about a month and a half later. When did you come down here?

A. I think I talked to you on the phone first, then I went to San Francisco and had a talk with Mr. Joralemon and got the files out there and on my way back stopped by here and went over it in detail with them. The exact date, let me see. Is that date important?

A. In view of the fact that there was no answer to Mr. Conner's letter until he mailed another one on May 16th to Mr. Joralemon I was sort of curious about the testimony with respect to what we did immediately. [89]

A. It looks to me like it was early in May, because shortly thereafter I was floating around a lot of quitclaim deeds and things.

Mr. McCarty: That is all I have.

The Witness: That is as close as I can come, Mr. McCarty.

Mr. McCarty: All right, thank you.

Mr. Dolph: I have no further questions.

(Witness excused.)

H. GREENWAY ALBERT

called as a witness herein, having been first duly sworn, testified as follows:

Cross-Examination

By Mr. Dolph:

Q. Will you state your name, please?

A. H. Greenway Albert.

Q. You have heard the testimony of these witnesses who have gone before, Mr. Albert, haven't you?

A. Yes, most of it.

Q. And you are one of defendants in this action?

A. That is correct.

Q. I hand you Plaintiff's Exhibits 1, 2 and 3 in evidence and ask you whether those were all signed by you [90] and your wife?

A. They were.

Q. I hand you 4 in evidence and ask you if you received that, and if so when? A. I did.

Q. It is dated November 5th, 1956.

A. I don't know whether it was air mail or not, but probably got it the 6th or 7th.

Q. When you received that what did you do in connection with this lease and option?

A. I didn't do anything right away until I got the——

Q. I think you have to speak a little louder, Mr. Albert, I don't think the Judge can hear you.

A. I don't think I did anything immediately after that. I called Mr. Joralemon up a little later. I think it was another letter, he send me some logs.

(Testimony of H. Greenway Albert.)

Q. About when was it you called Mr. Joralemon? A. I think about the 12th.

Q. Just a few days after you received this letter from him dated November 5th? A. Yes.

Q. What did you say to him over the telephone?

A. I told him that I had gotten a check and it was for the wrong amount. He said I would get a check for \$7,000 or something—it was short. And I also asked him if he had [91] sent me the logs on the holes.

Q. Asked him if he had sent you the logs?

A. Asked him if he would send me the logs.

Q. Did you tell him that you wanted any quit-claim deeds or releases on those claims?

A. I did not.

Q. Sir? A. I did not.

Q. Did you tell him that you or your attorneys took the position that until you received such quit-claim deeds or releases that you considered the notice of termination of no effect?

A. No, I didn't.

Q. Did you tell him that either you or your attorney considered that until he had paid you what you claimed was due on the quarterly payment that his notice of a termination had no effect?

A. No.

Q. Did he tell you during that conversation that he was moving out or had moved out of the property?

A. No, I don't think he said anything about that. It is in the letter there.

(Testimony of H. Greenway Albert.)

Q. You deny he told you he was moving out of the property or had moved out?

A. I don't remember about that. I had the letter there [92] saying they were through.

Q. He did tell you though he had to give the property up, didn't he?

A. I don't know whether he told me that over the phone; he told me that in the letter and I told him the amount of the check was wrong. And he said he would take it up with his attorneys, he had nothing to do with that. I said, well, I would get my attorney to take it up with his attorney.

Q. Didn't he tell you they were leaving the property in that telephone conversation?

A. I don't remember that.

Q. You remember your deposition was taken, don't you, Mr. Albert? A. Yes.

Q. On October 1st in our office, 1957, you remember that?

A. Yes, I remember you took the deposition.

Q. Page 26, line 24, were you asked this question and did you give this answer:

“Question: He told you they were leaving, they were getting out of the property, didn't he?

“Answer: Yes.”

Did you give that answer?

Mr. McCarty: No, he didn't give that answer. Read the whole answer.

Mr. Dolph: I will go ahead. [93]

Q. (By Mr. Dolph): Continuing: “But when I

(Testimony of H. Greenway Albert.)

talked on further he said he didn't know they were drilling next door."

Did you give that answer?

A. Yes, I asked Mr. Joralemon if he knew they were drilling on the Bluestone; he said no, he didn't.

Q. But you gave the answer I just read, didn't you? A. If I said so at that time.

Q. Then he did tell you on the phone he was leaving the property, didn't he?

A. I can't remember he said he was leaving the property. I know he wrote that in a letter.

Q. You knew he was getting out of the property and intended to, didn't you?

A. I thought he intended to——

Q. That is all. You have answered my question. After you got this letter from Mr. Joralemon dated November 5th you discussed the question of that letter with Mr. Conner, didn't you, your attorney?

A. Yes.

Q. Didn't he tell you that you had a right to demand quitclaim deeds if you wanted them?

Mr. McCarty: I object to that unless a foundation is laid. When did he talk to him?

Mr. Dolph: I asked him after he had received this letter. [94]

Mr. McCarty: That takes care of us up to this date. I object, no foundation has been laid.

The Court: Lay the foundation, Mr. Dolph.

Q. (By Mr. Dolph): I will ask you whether shortly after you had received this letter, between

(Testimony of H. Greenway Albert.)

the time you had received that letter and the end of 1956, did you have any discussion with Mr. Conner concerning the letter?

A. I don't remember the date.

Q. Maybe you can fix the time then. Did you ever have any discussion with him concerning the letter?

A. Yes, later on.

Q. When?

A. I don't remember just the date.

Q. Don't you remember the month?

A. Probably in February, I imagine.

Q. February of what, 1957?

A. That is right.

Q. You mean you didn't discuss it with Mr. Conner before February, 1957, you didn't discuss this letter with him?

A. I may have discussed it with him. I can't remember.

Q. But you don't remember. Didn't you go in right after you got the checks in November?

A. I did, I went over——

Q. About what time in November was that, what period in November was that? [95]

A. I think around the 12th or some place.

Q. What?

A. I think around the 10th or 12th.

Q. Did you discuss this letter dated November 5th at that time?

A. I think I mentioned I had gotten a letter. I think maybe I showed it to Mr. Conner.

(Testimony of H. Greenway Albert.)

Q. Did you discuss quitclaim deeds with him at that time?

A. I asked him if my lease was still good, whether the lease was cancelled; he said, "Did you get your quitclaim deed?" And I said no. I also hadn't gotten the full amount of my quarterly payment that was due on November 8th.

Q. Did he tell you at that time that you had a right to demand a quitclaim deed?

A. No, not at that time. I think it was in February he did, because I took it up with him then.

Q. He told you in February you had a right to demand the quitclaim deed?

A. I had some people out here interested in the property and he said I couldn't do any business with them because my lease was still in effect and until I got the quitclaim deed back, which I hadn't got. He said, "Did you get it?" And I said, "No, I haven't gotten any payments." The quarterly payment hadn't been settled yet. [96]

Q. Then it wasn't at the time you took your check in to him that he told you that you could demand the quitclaim deed?

A. No, that was discussed later.

Q. Going back to your deposition, page 30, line 14, were you asked these questions and did you give these answers:

"Question: When you took those checks in to Mr. Conner didn't you discuss anything about the quitclaim deeds or relationship of the property?

(Testimony of H. Greenway Albert.)

“Answer: Yes, I told him I hadn’t got the quitclaim deeds.

“Question: What did he say?

“Answer: He said the lease was still in effect until I got the quitclaim deed.

“Question: What did he tell you to do about it?

“Answer: He said there wasn’t anything I could do unless I wanted my property back, he could write and demand the quitclaim deed.”

Did you give those answers to those questions?

A. That is correct.

Q. Then you did discuss it with him at the time you went in with those checks?

A. I don’t know just when it was I discussed it, I don’t know the date.

Q. This deposition was taken back in October of last year. Would your recollection have been a little better [97] then than it is now?

A. It probably would be, yes.

Q. And you told him at that time not to demand a quitclaim deed, didn’t you? A. I did.

Q. Your answer?

A. Yes, I told him I didn’t want to demand a quitclaim deed.

Q. In that conversation you had with Mr. Joralemon a few days after you received this letter, you didn’t tell him anything about trying to hold him to the lease because you didn’t have the correct amount or the quitclaim deed, did you?

A. No.

Q. At that time you requested he furnish you

(Testimony of H. Greenway Albert.)

the log data from the drill holes he had made, right? A. That is correct.

Q. I hand you Exhibit 5 in evidence and ask you if you received that from Mr. Joralemon in response to your request? A. I did.

Q. After receiving Exhibit 5 in evidence did you get in touch with Mr. Joralemon and tell him you were taking the position that he was still on the lease and option and that rentals were accruing?

A. No. [98]

Q. Did you ever tell him that? A. No.

Q. You did have your attorney, Mr. Conner, write to Mr. Driscoll on a letter dated November 21st, which is Plaintiff's Exhibit 6 in evidence, didn't you? A. Yes, that is correct.

Q. You told him what to tell him?

A. Yes. I told him I hadn't gotten the full amount, the quarterly payment.

Q. Did you tell him to advise Mr. Driscoll you were taking the position there was no termination until this matter of the quarterly payment was straightened up?

A. No, that wasn't mentioned.

Q. How long have you known Mr. Joralemon?

A. Since March, 1911, I think.

Q. And he is a personal friend as well as a business acquaintance, right?

A. That is correct.

Q. And you feel you could trust him to take care of anything that would be necessary for your protection?

(Testimony of H. Greenway Albert.)

A. Ordinarily, but Mr. Joralemon said that the attorneys were taking care of it, so I got my attorney to get in touch with Mr. Driscoll and I didn't bother Mr. Joralemon any more. That was the last conversation we had.

Q. You and Mr. Joralemon by this time, after all these [99] years of friendship, had a feeling between you which made you feel as if he wouldn't take any unfair advantage of you by a technicality, didn't you?

Mr. McCarty: I don't see any propriety at all to any such question as that.

The Court: I don't see it, Mr. Dolph.

Q. (By Mr. Dolph): You never had any doubt in your mind if you had requested Mr. Joralemon to do so, he would furnish you with a quitclaim deed, did you?

A. I don't know what Mr. Joralemon would have done.

Mr. McCarty: I didn't hear that answer.

The Witness: I would assume they were holding the lease until they found out what they got in the deep holes they were drilling next to me at the Bluestone.

Q. (By Mr. Dolph): Mr. Albert, you had discussed this particular property with Mr. Joralemon many times over the period of years, haven't you?

A. Oh, yes; Mr. Joralemon had an option on it at one time.

Q. He was familiar with the property and you were familiar with it, right?

(Testimony of H. Greenway Albert.)

A. I don't know whether he was familiar with the conditions, recent conditions: he was familiar with it many years ago.

Q. But you had stated to him your theory about where the [100] ore would be if there was any, hadn't you?

A. Well, I think maybe I did, yes.

Q. You know you did, don't you?

Mr. McCarty: Just a moment. What conceivable materiality does this have?

Mr. Dolph: I believe it is preliminary, your Honor. I am entitled to go into it to show Mr. Albert knew what was going on.

The Court: I take it you are getting at estoppel now, Mr. Dolph?

Mr. Dolph: Yes, your Honor. Well, not only estoppel, but I think if you will read the last, the next to the last sentence in this letter.

Mr. McCarty: What letter is the Court reading now?

The Court: 5 in evidence. On estoppel, Mr. Dolph, what this man might by his conduct, or what he said or what he did would have led Mr. Joralemon to do or not to do, or believe or not believe, that would bear on that, but as to what this man thought——

Mr. Dolph: What he thought has a bearing on what his knowledge and understanding was as to the intentions of the other party.

The Court: Well, Mr. Joralemon's letters express that. They are already in evidence, his letter,

(Testimony of H. Greenway Albert.)

Exhibit 4, in addition to Exhibit 5. This goes way back, as I understand [101] it. Let me have the question again, Mr. Baker.

(The previous three questions and answers were read.)

The Court: I will sustain the objection. I don't see where it would have any bearing on this.

Q. (By Mr. Dolph): Mr. Albert, did you at any time, either personally or through agent or attorney, state expressly or indicate in any way to Mr. Joralemon or any of his agents, prior to Mr. Conner's letter dated April 16th of 1957, which is Exhibit 7 in evidence, did you ever before that time ever make any such indication that you took the position that this lease and option could not be terminated except after all payments had been made on that quarterly payment and after a quitclaim deed had been executed and delivered to you?

A. You say before this?

Q. Yes, sir. A. No.

Q. Prior to that time did you or anybody on your behalf ever request or demand a release or quitclaim deed on this property? A. No.

Mr. Dolph: No further questions.

Examination

By Mr. McCarty:

Q. Mr. Albert, I believe you said you talked to Mr. [102] Joralemon shortly after you got his letter of November 5th, right? A. Yes.

(Testimony of H. Greenway Albert.)

Q. Now here in evidence, Mr. Albert, is Plaintiff's Exhibit 5, which is a letter to you from Mr. Joralemon, dated November 16th?

A. That is right.

Q. It refers to a telephone conversation of that morning?

A. That is right.

Q. Could that have been the day you had that conversation?

A. Yes.

Q. Do you actually remember the date at this time?

A. I am not sure of it. It was approximately that.

Q. You told Mr. Dolph that in that conversation you discussed with Mr. Joralemon the fact that you weren't happy with the payment?

A. I did.

Q. And he said that he was leaving that up to the lawyers?

A. That's right.

Q. I think you said so accordingly after that conversation you went to talk to your lawyer?

A. He said that the——

Q. Answer my question.

Mr. Dolph: I object to the question on the ground it is leading and also calls for testimony that is already in. [103] The record speaks for itself.

Q. (By Mr. McCarty): Was it before or after your conversation with Mr. Joralemon on the phone that you went and consulted with Mr. Conner about the money?

A. That is correct.

(Testimony of H. Greenway Albert.)

Q. Which was it, before or after?

A. After.

Mr. McCarty: That is all the questions I have at this time.

Mr. Dolph: No further questions.

Mr. McCarty: I will stipulate the actual settlement of the thing was consummated by telephone August 17, because that is the date Homestake actually sent its money. As far as the formalities of the thing are concerned, the papers were mailed to Salt Lake City to be placed in escrow August 3rd. I have the letter of transmittal. It is entirely likely and I will submit, so far as the final settlement of the thing, that wasn't brought about until early September, 1956.

Mr. Dolph: We are referring now to the quiet title action against Uranium Company of America, your Honor. With the stipulation, we rest.

(Plaintiff rests.)

Mr. McCarty: Your Honor, if we could take a short recess. [104]

The Court: We will take a ten minute recess.

(Recess.)

After recess:

Mr. McCarty: I think counsel will join me in a stipulation, your Honor, that payments made on behalf of the plaintiff to the defendants were made

in the following amounts and on the following dates: The sum of \$2,000 was paid prior to September 20th, 1956; on September 20, 1956, \$1,000. On October 7, 1956, \$1,000. On November 6th, 1956, \$1,000. I think counsel will join me in a stipulation that all of those payments were made as \$1,000 a month provisions under the terms of the contract. Further, a payment was made November 6th, 1956, in the amount of \$3,932.15. A payment was made December 31, 1956, in the amount of \$1,286.52. In all cases the dates above mentioned are the dates appearing on the vouchers themselves. They don't purport to be the date of transmittal, as for instance, the last payment which was actually transmitted around the 4th or 5th of January. I will ask that counsel stipulate the vouchers may be admitted in evidence. They are all here except the voucher for the second payment, I don't know where it is.

Mr. Dolph: We have no objection to the vouchers, but as for your stipulation, I think you have made a slight error inadvertently. I think the first \$2,000 was paid under [105] paragraph 8-a of the contract.

Mr. McCarty: It had been theretofore paid?

Mr. Dolph: Yes. And the further \$1,000 payments were made under paragraph 8-b. That is the \$1,000 a month payment.

Mr. McCarty: I will accept that amendment.

Mr. Dolph: We will stipulate to the balance of your statement.

Mr. McCarty: May the vouchers be received in evidence as one exhibit?

Mr. Dolph: We have no objection.

The Court: It may be received as "M" in evidence.

(Defendants' Exhibit M marked in evidence.)

Mr. McCarty: Mr. Albert, will you take the stand again, please?

H. GREENWAY ALBERT

recalled as a witness, having been previously sworn, testified as follows:

Direct Examination

By Mr. McCarty:

Q. Mr. Albert, I have already discussed with you Mr. Joralemon's letter of December 16th referring to your telephone conversation with him. There is now in evidence Mr. Conner's letter of November 21, 1956, to Mr. Driscoll, [106] discussing the discrepancy in the amount forwarded?

A. That is correct.

Q. Was it between those two dates you talked to Mr. Conner? A. Yes.

Q. Now, had you talked to Mr. Conner at any time prior to that conversation and after you had received Mr. Joralemon's letter indicating his intention to surrender?

A. I think not. I don't recall it.

Q. What did you do with that draft. Mr. Albert, which was for some 3900 odd dollars, what did you actually do with that draft?

(Testimony of H. Greenway Albert.)

A. I took it over to Mr. Conner and left it with him. I told him the amount was incorrect; I didn't want to cash it.

Q. Do you recall when was the next time you saw Mr. Conner?

A. I think it was early in January.

Q. Did you receive that check——

A. 1200 and something.

Q. ——\$1286.52. What did you do with that?

A. I took it over and gave it to Mr. Conner, told him the amount was still insufficient.

Q. Have those drafts since been negotiated by you? A. Yes.

Q. When did you negotiate them? [107]

A. After they filed suit against me I asked you if it was all right to deposit those checks.

Q. And I told you it was?

A. You told me it was.

Q. And you did?

A. I did. You said I had better wait until I put them in for collection.

Q. After that date early in January when you took that second draft up to Mr. Conner, will you tell the Court about when you next discussed the matter with Mr. Conner?

A. I think it was around February, I think it was.

Q. And at that time did you have any discussion with Mr. Conner with respect to legal position under this contract?

(Testimony of H. Greenway Albert.)

Mr. Bilby: I object to this as being immaterial, if the Court please.

Mr. McCarty: They seem to be greatly concerned over his state of mind.

The Court: I think he was examined about his conversation there in February, 1957, about the time he went to see Mr. Conner.

Mr. McCarty: Yes, sir, he was.

Mr. Dolph: He was examined about an earlier time he went to see Mr. Conner, if the Court please.

Mr. Bilby: He said he went in February but he was not examined about that, your Honor. He was examined about the [108] time he said he took the checks.

The Court: He testified in February he wanted, or had somebody express some interest in the property and he went to Mr. Conner and talked to him about whether he could let them have it and Mr. Conner said no because the lease was still in effect.

Mr. McCarty: I will withdraw the question.

Q. (By Mr. McCarty): Do you recall when it was you next went to see Mr. Conner about it?

A. I think the 15th of April.

Q. That was the day before Mr. Conner's letter to Mr. Joralemon, right? A. That is true.

Q. Do you now remember how many times altogether you talked to Mr. Conner about this?

A. No, but quite a number of times. I did some telephoning, too.

Mr. McCarty: That is all the questions I have.

Mr. Dolph: No questions.

IRA JORALEMON

recalled as a witness, having been previously sworn,
testified as follows: [109]

Cross-Examination

By Mr. McCarty:

(Defendants' Exhibit N marked for identification.)

DEFENDANTS' EXHIBIT N

[Letterhead of Pioneer Hotel, Tucson, Ariz.]

Sept. 11, 1956.

Mr. Charles E. Conner,
Tucson.

Dear Mr. Conner:

I enclose herewith the Driscoll draft of the proposed final contract between Greenway Albert and myself that you handed me this afternoon, and also a later draft that includes the changes agreed on with Greenway Albert after we left you.

These may be useful in your telephone talk with Driscoll tomorrow.

Yours sincerely,

/s/ IRA B. JORALEMON.

Marked for Identification February 21, 1958.

(Testimony of Ira Joralemon.)

Q. (By Mr. McCarty): Mr. Joralemon, so that you won't have to rely on your memory at all, I want you to examine N for identification and tell me whether or not you were in Tucson, Arizona, September 11, 1956? A. Yes.

Q. That letter is a letter which you actually wrote in Tucson that day? A. That is true.

Q. Prior to the writing of that letter on that date you had been in conference with Mr. Albert on this deal? A. I had been.

Q. I notice in the letter that you returned a draft of a contract to Mr. Conner so that he would have the benefit of it in a telephone call which you anticipated he would make to Mr. Driscoll the next day? A. That was evidently it.

Q. All right, sir. I want you to look at this J for identification, Mr. Joralemon, the handwriting appearing at the top of the first page of that is your handwriting? A. That is my handwriting.

Q. This is in truth and in fact the very draft you discussed with Mr. Albert in Tucson. [110] Arizona?

A. I think it must have been. I am not sure but what I may have marked two copies, but this is the version of the contract I discussed with Albert. It may be one of two I discussed with him.

Q. I notice at the top these words appear: "Draft discussed by JGA and IVJ, September 11, 1956". A. Yes.

Q. That is written in your handwriting?

A. Yes. My recollection is I had two copies of

(Testimony of Ira Joralemon.)

this and made the later comments on each copy, so there were two of them discussed with Albert at the same time.

Q. Where did you get the drafts from?

A. Brought them from San Francisco and they had resulted in several earlier drafts prepared, some by Mr. Driscoll, some by Mr. Taylor, some a combination of them. They were the result of quite a lot of discussion.

Q. You brought these from San Francisco?

A. I brought them from San Francisco.

Q. On page 2 on the margin of the page there is some handwriting. That is also your handwriting?

A. That is my handwriting.

Q. And these words which pick up after the provisions of the contract with respect to the surrender of the lease, there is handwritten——

Mr. Dolph: If the Court please, we object to this on [111] the ground the instrument is not in evidence and the question is immaterial.

Mr. McCarty: I will offer the instrument in evidence.

Mr. Dolph: We object to it upon the ground it is immaterial.

The Court: May I see it?

Mr. Dolph: The parol evidence rule prohibits going into all these things.

Mr. McCarty: I understand the Court held there was an ambiguity with respect to that provision.

Mr. Dolph: We don't dispute there is an ambiguity.

(Testimony of Ira Joralemon.)

The Court: May I see 3. I don't know that this would be of any help, Mr. McCarty. You are referring to the matter in paragraph three?

Mr. McCarty: I am indicating with some vividness Mr. Driscoll's answer to Mr. Dolph's leading as to whether or not they had intended that payment to be a condition precedent and there it is in the handwriting of the parties. The Court has ruled he conceived there to be an ambiguity in connection with 3 in comparison to 13.

The Court: The part that was ambiguous to me is not aided by what I see right now. I am going to receive it and I will consider it only for that purpose, if it throws any light on what I feel at this time is an ambiguity between 3 and 13, I will consider it, otherwise it will be disregarded. [112]

Mr. McCarty: It might greatly shorten this procedure, I understand probably the Court's feeling with respect to ambiguity is directed to the necessity of a deed, is that the Court's feeling about an ambiguity?

The Court: Yes. Whether it was necessary under the provisions of the contract for the lessee or optionee to give the deed in order to terminate the contract or whether the notice would terminate it subject to the right of Mr. Albert to demand the deed.

Mr. Bilby: Whether the deed had to accompany the notice.

The Court: No, whether a deed was necessary to make the termination or the notice effective,

(Testimony of Ira Joralemon.)

whether accompanying it or any other time. To me I see a little difference in the wording, but I am still of the opinion there is an ambiguity there. I will consider it for that purpose. That is J.

(Defendants' Exhibit J marked in evidence.)

Mr. McCarty: I have no further questions.

Mr. Dolph: No further questions.

Mr. McCarty: The defendants rest, your Honor.

(Defendants rest.)

Mr. Dolph: Have all our exhibits been admitted?

The Clerk: Yes.

Mr. Dolph: We have nothing further and we rest. [113]

Mr. McCarty: May I ask if all the exhibits I have have been marked, save and except the last one?

The Clerk: "F" was not admitted.

Mr. McCarty: I don't need that admitted. And the last one I had marked was not admitted.

The Court: I don't show "H" admitted.

Mr. McCarty: I ask that that be admitted. That is a letter in which Mr. Driscoll transmitted to Mr. Conner drafts.

Mr. Dolph: We object to it on the ground it is not material.

The Court: May I see it? It may be received.

(Defendants' Exhibit H marked in evidence.)

DEFENDANTS' EXHIBIT H

August 25, 1956.

Mr. Charles Conner,
Box 310,
Tucson, Arizona.

Dear Mr. Conner:

Herewith copy of proposed agreement between Albert and Joralemon. I would appreciate your comments on it as soon as possible.

It is becoming more important that we definitely ascertain whether any of these claims are located on state land and not a part of the unappropriated public domain subject to mineral entry.

I would also appreciate hearing from you as to how our settlement is progressing.

Very truly yours,

R. E. DRISCOLL, JR.

RED:d

Marked for Identification February 21, 1958.

Mr. McCarty: We are prepared to argue the matter with authorities at this time, if your Honor wants to hear argument.

Mr. Dolph: We can do so also, but I believe the time could be used to better avail if the Court

gave us a chance to look over this voluminous set of exhibits.

The Court: I will tell you what I prefer, I prefer counsel to give me a memoranda without the motion, just limit it strictly to your views as to what all the evidence, including the exhibits, amounts to, and your position on the legal points.

Mr. Bilby: A brief memorandum? [114]

The Court: Yes. I don't care anything about any discussion of the habits, character or anything else of any of the parties; just exactly what the evidence amounts to and the legal points that are involved in it. I think all counsel know what I have in mind on it. How much time do you need for that?

Mr. McCarty: You want us to file them simultaneously?

The Court: Simultaneously.

Mr. Dolph: I think probably a couple of weeks, your Honor.

Mr. McCarty: I have my brief ready except for typing it so any time at all, if the Court please.

The Court: Do you want two weeks, Mr. Dolph?

Mr. Dolph: I will try to get it in earlier than that, but you never know what might come up.

Mr. McCarty: If you want more, ask for it.

Mr. Dolph: Let's ask for ten days.

The Court: I would rather give you what time you need. You know your situation.

Mr. Dolph: If we may, I would like two weeks then.

The Court: The matter will be submitted on

memoranda to be filed by each side within fifteen days of this date, the memoranda to be filed simultaneously. When the memoranda are filed the matter will stand submitted. [115]

State of Arizona,
County of Pima—ss.

I, Fred L. Baker, do hereby certify that I am an Official Court Reporter in the United States District Court, District of Arizona, and that as such Official Court Reporter, I attended the hearing in the foregoing-entitled cause; that I took down in shorthand all the oral testimony adduced and proceedings had; that such shorthand was reduced to writing under my supervision and the foregoing 116 pages of typewritten matter contain a full, true and correct transcript of my shorthand notes taken by me as aforesaid.

Witness My Hand this 24th day of September, 1958.

/s/ FRED L. BAKER,
Official Court Reporter.

[Endorsed]: Filed September 25, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,

District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records of the said Court, including the records in the case of Ira B. Joralemon, Plaintiff, versus H. Greenway Albert and Maja Greenway Albert, husband and wife, Defendants, numbered Civil-964 Tucson, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my office in the City of Tucson, State and District aforesaid.

I further certify that the said original documents, and said copies of the minute entries, together with the original exhibits transmitted herewith, constitute the record on appeal in said case as designated in the Appellants' Amended Designation and Designation by Appellee of Additional Matters to be Included in Record filed therein and made a part of the record attached hereto and the same are as follows, to wit:

1. Plaintiff's Complaint and all exhibits attached thereto.
2. Defendants' Answer and Counterclaim.
3. Plaintiff's Reply to Counterclaim.
4. Minute entry of October 4, 1957.
5. Defendants' Amended Counterclaim.
6. Plaintiff's Reply to Amended Counterclaim.
7. Minute entry of February 21, 1958 (proceedings of trial).
8. Plaintiff's original exhibits Nos. 1 to 10, inclusive, and Defendants' original exhibits A to E, inclusive, and G to M, inclusive, admitted, and Defendants' exhibits F and N marked for identification.
9. Minute entry of March 25, 1958 (opinion of the trial court).
10. Minute entry of May 5, 1958.
11. Minute entry of June 10, 1958.
12. Findings of Fact and Conclusions of Law Proposed by Plaintiff.
13. Defendants' proposed Findings of Fact and Conclusions of Law.
14. Plaintiff's Objections to Findings of Fact and Conclusions of Law Proposed by Defendants.
15. Findings of Fact and Conclusions of Law.
16. Judgment.
17. Notice of Appeal.
18. Bond on Appeal.
19. Appellants' Designation of Record.
20. Reporter's Transcript of Proceedings filed September 25, 1958.
21. Appellants' Amended Designation of Record.

22. Statement of Points on which Defendants-Appellants Intend to Rely.

23. Designation by Appellee of Additional Matters to be Included in Record.

24. Reporter's Transcript of Pretrial hearing had October 4, 1957, filed on October 13, 1958.

I further certify that the Clerk's fee for preparing and certifying this record on appeal amounts to the sum of \$4.40 and that sum has been paid to me by counsel for the appellants.

Witness my hand and the seal of said Court at Tucson, Arizona, this 13th day of October, 1958.

WM. H. LOVELESS,
Clerk.

[Seal] By /s/ ERMELIA COLE,
Deputy Clerk.

[Endorsed]: No. 16222. United States Court of Appeals for the Ninth Circuit. H. Greenway Albert and Maja Greenway Albert, Appellants, vs. Ira B. Joralemon, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed and Docketed: October 15, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 16222

H. GREENWAY ALBERT, et ux.,
Appellants,
vs.

IRA B. JORALEMON,
Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANTS INTEND TO RELY

Appellants in their appeal from the final Judgment entered in this action by the District Court of the United States for the District of Arizona on the 18th day of June, 1958, intend to rely on the following points:

1. The District Court's Findings of Fact and Conclusions of Law upon which said Judgment was based, insofar as set forth in Exhibit "A" which is attached hereto and by this reference made a part hereof, are not supported by the evidence.

2. The District Court erred in reaching Conclusion of Law V, set forth in Exhibit "A," for the reason that there was no allegation of waiver in the pleadings.

Respectfully submitted,

GATEWOOD & GREENWAY,

By /s/ THOMAS J. TORNEY,

Attorneys for Appellants.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 25, 1958.

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No. 16222
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

H. GREENWAY ALBERT and MAJA GREENWAY ALBERT,
husband and wife,

Appellants,

vs.

IRA B. JORALEMON,

Appellee.

Opening Brief of Appellants, H. Greenway Albert and
Maja Greenway Albert, Husband and Wife.

Jurisdictional Basis.

Appellants are residents and citizens of the State of Arizona and Appellee is a resident and citizen of the State of California. The amount in controversy exceeds the sum of \$3,000.00 exclusive of costs and interest. Jurisdiction of the District Court of the United States for the District of Arizona in this matter is based upon the above facts, alleged in Plaintiff's Complaint, page 3 of the printed record, as amended by oral stipulation at the time of trial, page 89 of the printed record.

Title 28, U. S. C. A. 1948, Sec. 1332.

This appeal is taken from a Judgment of the District Court of the United States for the District of Arizona entered June 18, 1958. This Court has jurisdiction of appeals from all final decisions of the District Courts of the United States.

Title 28, U. S. C. A. 1948, Sec. 1291.

Notice of Appeal from such Judgment to the United States Court of Appeals for the Ninth Circuit was timely given by Appellants [p. 65, printed record]. Bond on Appeal was timely filed [p. 66, printed record].

Statement of the Case.

On or about September 21, 1956, the Appellee, Ira B. Joralemon, and Appellants, H. Greenway Albert and Maja Greenway Albert, entered into a written contract entitled Lease and Option to Purchase [pp. 116-130, printed record] wherein Appellants leased to Appellee certain unpatented mining claims in Pima County, Arizona. The agreement provided for the payment by Appellee to Appellants of \$1,000.00 per month rent, plus a quarterly rental payment of \$7,000.00. The agreement provided further that Appellee might terminate the same after the payment of the first quarterly payment of \$7,000.00 by giving to Appellants notice in writing of termination, accompanied by an executed and acknowledged quitclaim deed to the leased premises.

As found by the lower court, when the parties entered into the lease and option agreement, it was their intention that Appellee could not terminate the agreement before, nor until, he had made payment of the first quarterly payment of \$7,000.00; and it was their intention at that time, also, that Appellee could not terminate the lease before, nor until, he executed and delivered to Defendants a quitclaim deed duly acknowledged, releasing and quitclaiming to Appellants the demised premises [see pp. 55-56, printed record].

On or about November 5, 1956, Appellee mailed to Appellants a letter stating that Appellee was reluctantly forced to surrender the lease and option, stating that the

\$7,000.00 payment due November 8, 1956, would be paid when due, and stating, further, that the quitclaim deed provided for in the Agreement would be sent to Appellants as soon as practicable. The letter was received by Appellants in due course of the mail.

On or about November 6, 1956, Appellee by and through his agent mailed to Appellants a check for \$1,000.00 representing the regular monthly rental payment and a check for \$3,932.15 representing the first quarterly rental payment of \$7,000.00 less amounts claimed by Plaintiff to be deductible under the Agreement as legal expense incident to clearing title to the demised premises.

On or about November 16, 1956, the Appellant, Mr. Albert, telephoned Appellee in San Francisco requesting copies of the logs of the five holes drilled by Plaintiff on the leased premises. In that conversation, Mr. Albert expressed dissatisfaction over the remittance made by Appellee on or about November 6, 1956, stating that he believed Appellants had been underpaid. At that time, Appellee agreed to send the drilling logs as requested and explained that the adjustment of the difference between the parties as to money matters would be placed in the hands of Appellee's attorneys. Appellee promptly sent to Appellants the drilling logs requested.

When Appellants received Appellee's letter of November 5, 1956, they understood that the Lease and Option Agreement required Plaintiff to make the \$7,000.00 payment and to execute and deliver a quitclaim deed of the leased premises before he could terminate the Agreement. Appellant did not at any time prior to April 16, 1957, give notice to Appellee or make claim to him that the Lease and Option Agreement was not and would not be terminated until the \$7,000.00 payment was made and the quitclaim deed delivered.

On or about November 21, 1956, Appellants through their attorney mailed to the Appellee through his attorney a letter asserting that the payment of \$3,932.15 was not proper and that Appellee was still indebted to the Appellants on account of the first quarterly payment.

On or about November 26, 1956, Appellee through his attorney responded to Appellant's letter of November 21, 1956, disagreeing with the position of the Appellants and stating that the Appellants would be hearing from San Francisco either direct or through the office of Appellants' attorney.

On or about January 4, 1957, Appellee through his agents mailed to Appellants a check in the sum of \$1,286.52 representing an additional payment on account of the first quarterly payment of \$7,000.00 accompanied by a letter stating that the remittance of \$3,932.15 which was made November 6, 1956, had been the result of an error in computation.

Neither the check for \$1,286.52 nor the check for \$3,932.15 were negotiated by the Appellants until after the institution of this litigation in the lower court.

On or about May 31, 1957, Appellee through his attorney mailed to Appellants a letter enclosing a quitclaim deed duly executed and acknowledged. Said letter and deed were received by Appellants in due course of the mail. On or about May 31, 1957, Plaintiff deposited the sum of \$23,000.00 in escrow in the Tucson downtown office of the Valley National Bank of Phoenix pursuant to the provisions of Paragraph 14 of the Lease and Option Agreement [see p. 126, printed record].

At no time prior to May 31, 1957, did the Appellee deliver or tender a quitclaim deed to the premises to the Appellants.

The total amount paid by Appellee to Appellants under the Lease and Option Agreement and on account of the quarterly payment of \$7,000.00 due November 8, 1956, is the sum of \$5,218.67.

The failure to deliver the quitclaim deed to the Defendants promptly after November 6, 1956, was occasioned by the oversight of John W. Hamilton, Secretary of Homestake Mining Co., or of some other officer or agent of Homestake Mining Co., and the said John W. Hamilton or such other officer or agent of the Homestake Mining Co. in such oversight was acting as the agent of the Appellee within the scope of his authority.

The failure to make proper remittance in connection with the \$7,000.00 quarterly payment was occasioned by a dispute between the parties as to what portion of said payment was properly offset by expenditures made by Appellee in clearing title to the demised premises and as to the proper pro-ration of such expenditures.

On May 31, 1957, Appellee through his attorneys filed in the United States District Court for the District of Arizona, a Complaint, wherein he sought a declaration of the parties' rights and obligations under the Lease and Option to Purchase Agreement between Appellee and Appellants; an adjudication that the said Lease and Option to Purchase Agreement was terminated by service upon Appellants of Appellee's letter of November 5, 1956; an adjudication that Appellee had paid to Appellants all sums the Appellants were entitled to under said Lease and Option to Purchase Agreement, and an adjudication that Appellee was entitled to all of funds placed in escrow with the Valley National Bank of Phoenix hereinabove mentioned [see pp. 9-10, printed record].

On July 5, 1957, Appellants through their attorneys, filed an Answer to Appellee's Complaint alleging, *inter*

alia, that the said Lease and Option to Purchase Agreement remained in full force and effect until terminated May 31, 1957, and a Counterclaim alleging that Appellee was at that time indebted to Appellants in the sum of \$21,179.56 together with interest from due dates, under terms of the Lease and Option to Purchase Agreement [see pp. 19-22, printed record]. It was Appellants' position that the payment of the first quarterly payment of \$7,000.00 and the execution, acknowledgement and delivery to Appellants of a quitclaim deed were conditions precedent to the exercise by the Appellee of his option to terminate the contract, and that because of his failure to perform the said conditions precedent, the lease was not terminated by service upon Appellants of Appellee's letter of November 5, 1956.

The trial court, in its Findings of Fact and Conclusions of Law, found that the payment of the first quarterly payment, and the execution, acknowledgement and delivery of the quitclaim deed were conditions precedent to the exercise by Appellee of his option to terminate the contract, but that Appellants waived performance by Appellee of the conditions precedent to Appellee's right to terminate and the Lease and Option to Purchase Agreement was terminated upon such waiver and on or about November 16, 1956.

The court concluded further that Plaintiff-Appellee was bound to pay the \$7,000.00 quarterly payment which fell due on November 8, 1956, and deliver the quitclaim deed to the demised premises. Such quitclaim deed was delivered to and accepted by the Defendants-Appellants on or about May 31, 1957. The court found further that there remained due from Appellee to Appellants on account of the first quarterly \$7,000.00 payment, a balance

of \$1,330.00, following the payments of \$3,912.15 and \$1,286.52 made by Appellee to Appellants on November 6, 1956, and January 4, 1957, respectively.

Judgment was entered June 18, 1958, for Defendants-Appellants on Count One of their Amended Counterclaim against Plaintiff-Appellee in the following amounts:

(a) Interest at the rate of six per cent (6%) per annum on the sum of \$2,616.52 from November 8, 1956, to January 8, 1957.

(b) The sum of \$1,330.00, together with interest thereon at the rate of six per cent (6%) per annum from January 8, 1957, until paid.

(c) Costs of suit.

The Judgment was to the further effect that the lease and option was terminated prior to December, 1956; that Defendants-Appellants had no rights under the lease and option beyond recovery of the above amounts, and that the Plaintiff-Appellee was entitled to all funds held in escrow at the Tucson office of the Valley National Bank of Phoenix after the above amounts had been paid into court (pp. 63-64, printed record).

From that Judgment this appeal is taken.

Specification of Errors.

I.

The District Court erred in rendering Findings of Fact and Conclusion of Law on the issue of waiver and judgment pursuant thereto because there was no evidence to support such Findings or Conclusion.

II.

The District Court erred in reaching its Conclusion of waiver and rendering judgment pursuant thereto because there was no allegation of waiver in the pleadings.

ARGUMENT OF THE CASE.

Argument of Specification of Errors I.

Summary.

Appellants contend that there was no evidence at the trial of this matter to support the following portions of the District Court's Findings of Fact and Conclusions of Law:

FINDING OF FACT VII.

[See p. 57, printed record.]

"When defendants received plaintiff's letter of November 5, 1956, . . . they knew that plaintiff was attempting to, and claiming the right to, terminate the Lease and Option without first making the payment and without first delivering the quitclaim deed. At that time, and thereafter until some date subsequent to January 1, 1957, although disputing with plaintiff the amount of money due to them as accrued rentals, defendants acquiesced in the termination of the Lease and Option agreement notwithstanding plaintiff had failed to make the \$7,000.00 payment and to deliver the quitclaim deed. About November 16, 1956, defendants recognized that plaintiff's interest in the demised premises was ended. . . ."

CONCLUSION OF LAW V.

[See p. 61, printed record.]

"Defendants waived performance by plaintiff of the conditions precedent to plaintiff's right to terminate (being the conditions described in Conclusions of Law I and III) and the Lease and Option agreement was terminated upon such waiver and on or about November 16, 1956."

Argument.

The elements of waiver have been set forth on numerous occasions by the Arizona Supreme Court. However, the Court has not been altogether consistent in its discussion of the subject.

It has been said that waiver must be intentional and upon a consideration, or the act relied on must be such as to constitute an estoppel.

Davis v. Standard Accident Insurance Co., 35 Ariz. 392, 398, 278 Pac. 384, 386.

The element of consideration is not mentioned in the more recent case of *City of Tucson v. Koerber*, 82 Ariz. 347, 356, 313 P. 2d 411, 418; which defines waiver as the voluntary and intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right.

The latter definition also was used in *Southwest Cotton Co. v. Valley Bank*, 26 Ariz. 559, 563, 227 Pac. 986, 988, which preceded the Davis opinion cited above. The Arizona Court, in *Guarantee Title and Trust Co. v. Babbitt Brothers Trading Co.*, 47 Ariz. 47, 53; 53 P. 2d 734, 736, quotes both from *Southwest Cotton Co.* and the *Davis* cases in discussing the essential elements of waiver, then goes on to say:

“It is not necessary that there be both consideration and estoppel. Either is sufficient, but one at least must exist to make a valid and irrevocable waiver.”

Waiver is distinguished from estoppel in *The Equitable Life Assurance Society v. Pettid*, 40 Ariz. 239, 11 P. 2d 833, 838. At page 252 of the official report, the Court says:

“In waiver, the essential element is an *actual intent* to abandon or surrender a right while in estoppel such

intent is immaterial, the necessary condition being the deception to his injury of the other party by the conduct of the one estopped.”

The distinction again is made in *Waugh v. Lennard*, 69 Ariz. 214, 211 P. 2d 806, 812. At page 223 of the official report, the Court says:

“Waiver is defined as a voluntary and intentional relinquishment of a known right, . . . whereas ‘estoppel’ means that a party is precluded by his own acts from asserting a right to the detriment of another who, entitled to rely on such conduct, has acted thereon.”

It is submitted at this time that there was no finding of estoppel in the instant case on the issue of the Appellee’s failure to deliver the quitclaim deed to the Appellants. There was no finding that such failure resulted from the reliance by Joralemon on any words or conduct of Albert. On the contrary, the trial court found, at page 60, printed record:

“The failure to deliver the quitclaim deed to the defendants promptly after November 6, 1956, was occasioned by the oversight of John W. Hamilton, secretary of Homestake Mining Co., or of some other officer or agent of the Homestake Mining Co. . . .”

The same is true of the Appellee’s failure to make the \$7,000.00 quarterly payment. The trial court found, at page 60, printed record:

“The failure to make proper remittance in connection with the \$7,000.00 quarterly payment was occasioned by a dispute between the parties as to what portion of said payment was properly offset by expenditures made by plaintiff in clearing title to the demised premises and as to the proper proration period of such expenditures.”

Waiver requires the concurrence of act and intent, although the intent may be manifested or inferred from the act. (*City of Tucson v. Koerber, supra.*) Where the intent must be inferred from conduct, and the conduct is such that reasonable minds may differ as to what the inference should be, waiver is a question of fact. (*Southwest Cotton Co. v. Valley Bank, supra.*) However, when the conduct relied on does not warrant the inference of a voluntary and intentional relinquishment of a known right, there is no waiver as a matter of law.

City of Tucson v. Koerber, supra.

See also:

Birkeland v. Korbet (Wash.), 320 P. 2d 635, 643;

Phoenix Insurance Company v. Heath, 90 Utah 187, 61 P. 2d 308.

This Court has discussed waiver in a case arising under California law, *Pacific States Corporation v. Hall* (C. C. A. 9th), 166 F. 2d 668. At page 671, the Court says:

“Appellees contend that consideration is not always a requisite for waiver, but it is generally held that where substantial rights are involved, a waiver must be supported by a consideration to be valid. 56 Am. Jur. Sec. 16, page 117. At any rate, waiver consists of a voluntary and intentional relinquishment of a known right; and to prove a case of implied waiver of a legal right, as appellees here attempt to do, there must be a clear, unequivocal and decisive act of the creditor showing a purpose to abandon or waive the legal right, or acts amounting to an estoppel on his part. 56 Am. Jur. Sec. 17, page 118; *First National Bank vs. Maxwell*, 123 Cal. 360, 55 P. 980, 69 Am. St. Rep. 64; *Johnson vs. Kaeser*, 196 Cal. 686, 239 P. 324. No such intent, or course of conduct on the part of appellant, appears.”

In *Buffum v. Chase National Bank of the City of New York* (C. C. A. 7th), 192 F. 2d 58, the Court at page 61 said of waiver:

“It may be expressed formally or it may be implied as a necessary consequence of the waiver’s conduct inconsistent with an assertion or retention of the right. It must be proved by the party relying upon it. And if the only proof of intention to waive rests on what a party does or forebears to do, his act or omissions to act should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible. 67 C. J. 311 and cases there cited.”

A California Court has said:

“A waiver of a right cannot be established without a clear showing of an intent to relinquish such right, and doubtful cases will be decided against a waiver.”

Greninger v. Fischer, 81 Cal. App. 2d 549, 554, 184 P. 2d 694, 697.

There is no evidence in the record of this matter of any conduct by Appellants warranting an inference of their relinquishment of any known right. There is no record of any conduct by Appellants inconsistent with their assertion of their rights under the Lease and Option Agreement.

The context of Mr. Joralemon’s letter of November 5, 1956, is directly opposed to that portion of the District Court’s Finding of Fact VII to the effect that when the Alberts received the letter of November 5, 1956,

“ . . . they knew that plaintiff was attempting to, and claiming the right to, terminate the lease and

option without first making the payment and without first delivering the quitclaim deed” [see pp. 57-58, printed record].

Mr. Joralemon, in that letter, after indicating his intention to surrender the lease and option, wrote the following:

“The \$7,000.00 payment due on November 8, 1956 will be paid when due, and the quitclaim deed specified in Paragraph 3 of the contract will be sent to you as soon as practicable” [see p. 134, printed record].

Contrary to the finding of the trial court, the Alberts were assured by Mr. Joralemon in the letter of November 5, 1956, that the payment would be made when due, and that the quitclaim deed would be sent as soon as practicable. The inescapable interpretation of the first paragraph of the letter [p. 134, printed record] is that Mr. Joralemon intended “to surrender the lease and option” on performance of the conditions precedent.

There is no evidence anywhere in the record that “defendants acquiesced in the termination of the Lease and Option notwithstanding plaintiff had failed to make the \$7,000.00 payment and to deliver the quitclaim deed,” as found by the Court [p. 58, printed record].

Acquiescence implies a knowledge of the facts; there can be no acquiescence without knowledge of the fact or facts alleged to have been acquiesced in. (*Connell v. Clifford*, 39 Colo. 121, 88 Pac. 850, 851.) There is no evidence in the record to show Appellant’s knowledge that Appellee claimed the Lease and Option Agreement had been terminated without performance of the conditions precedent, prior to the filing of Appellee’s Complaint in the District Court.

On the other hand, Mr. Joralemon's testimony at the trial gives ample evidence that he made no such claim. To that effect, see the following excerpts:

"Q. You took it to be your obligation under the lease to forward such a deed, right? A. Yes.

Q. What did you do to the end that such a deed be sent? A. I called up—I called up somebody in the Homestake office, I am not sure whom, and had sent them a copy of my letter to Mr. Albert and asked if they would take care of the quitclaim deed" [see pp. 156-157, printed record].

"Q. Within a day or two at the most of the date of this letter, November 5, 1956, you called Mr. Hamilton, the secretary of Homestake Mining Company, enclosing a copy of this and asking that he take care of the deed which you thought to be required, right? A. That is correct.

Q. Did you at any time subsequent to that time make any inquiry as to whether or not that had been done? A. I did not, not until after receiving Mr. Conner's letter in April or May" [see p. 157, printed record].

"Q. What did you do about settling the dispute about the money, if anything? A. I did nothing. I left that up to the lawyers.

Q. Did you call Mr. Driscoll and tell him that Mr. Albert was dissatisfied? A. I think I telephoned either Mr. Hamilton or Mr. Driscoll directly. Mr. Driscoll was traveling a lot of the time and hard to get. It may have been Mr. Hamilton" [see p. 159, printed record].

"Q. Let me ask you this, Mr. Joralemon, at any time after your discussion—first I will ask you this, at any time after your letter of November 5, 1956, in

which you gave notice of your intention to surrender or your notice of surrender, whatever the case may be, at any time after that time, what, if anything, did you do to bring about a revocation of the contract other than calling Mr. Hamilton and asking that the deed be sent and the money be transmitted, did you ever after that time do anything at all? A. I did not. I assumed nothing else was necessary.

Q. You of course relied on Mr. Hamilton to get the deed out and relied on your attorneys to get the proper amount of cash down here? A. That is correct.

Q. I suppose you were somewhat astounded when you got Mr. Conner's letter of April 16th calling your attention to the fact that no deed had ever been sent? A. I was very much surprised that Greenway Albert had not let me know of it earlier.

Q. Were you surprised the secretary of Homestake Corporation hadn't let you know? A. Yes, I was surprised I had heard nothing about it from anybody" [see p. 160-161, printed record].

It is to be noted that the District Court's Conclusion of Law V [p. 61, printed record] places the alleged waiver on or about November 16, 1956. It is the telephone conversation of that date, then, that must warrant the inference of the voluntary relinquishment of a known right.

Mr. Albert's failure to demand a quitclaim deed in the telephone conversation could not possibly warrant such an inference. Even if the law generally were to impose a duty to demand the performance of a condition precedent as the alternative to waiving such performance (and Appellants do not understand such to be the law), there could be no such duty in the instant case. Certainly, after Mr. Joralemon had professed his intention to perform the con-

ditions precedent to the exercise of his option to terminate the agreement, Mr. Albert had no duty on November 16, 1956, or at any subsequent time, to demand such performance.

This Court stated, in *Pacific States Corporation v. Hall*, *supra*, at page 671:

“The mere fact that interest was not listed in the statement, either because of some oversight or because the indebtedness at that time appeared to be far greater than the creditor could reasonably expect to recover from Appellees, does not constitute a waiver of the right to claim such interest.”

In line with the above, Mr. Albert's failure to demand performance on November 16, 1956, which had already been promised in Mr. Joralemon's letter of November 5, 1956, could not possibly constitute a waiver of the right to such performance.

It is respectfully submitted that the only act of Appellants, or either of them, alluded to by the trial court in reaching its Finding of Fact VII, upon which Conclusion of Law V apparently is based, occurred in the telephone conversation on or about November 16, 1956. Specifically, the lower Court found:

“About November 16, 1956, defendants recognized that plaintiff's interest in the demised premises was ended and defendant, Mr. Albert, requested and received from plaintiff the drilling logs pertaining to the demised premises” [see p. 58, printed record].

Mr. Albert's request for the drilling logs was the exercise of an express right under Paragraph 6 of the Lease and Option Agreement. Paragraph 6 provides, *inter alia*:

“The lessor shall have the right to enter the property at any reasonable time for inspection thereof and development reports shall be available to him” [see p. 121, printed record].

As the assertion of a right under the agreement, and particularly so at a time when Appellee had indicated an intention to terminate in his letter of November 5, 1956, Mr. Albert's request for the drilling logs on November 16 was anything but evidence that “defendants recognized that plaintiff's interest in the demised premises was ended. . . .”

At this point, Appellants' two specifications of error necessarily overlap to some degree. In the absence of any allegation or argument on the issue of waiver in the trial court, the court's attention at no time was directed to the provision above quoted from Paragraph 6 of the Lease and Option Agreement, in explanation of Mr. Albert's request of November 16, 1956.

Appellants forcefully contend herein that there was no evidence of any conduct on their part which warranted an inference of the voluntary relinquishment of a known right. Further, the trial court's reference to the request for the drilling logs, in its Finding of Fact supporting its Conclusion of waiver, clearly shows that Appellants were misled to their injury by the absence of any allegation of waiver in the pleadings. On the issues raised by the pleadings, Appellants had no reason to introduce evidence showing that the request for the drilling logs was referable to the Lease and Option Agreement.

Argument on Specification of Errors II.

Summary.

Appellants contend that the District Court as a matter of law was precluded from finding that they waived performance of the conditions precedent to Appellee's right to terminate the Lease and Option to Purchase Agreement, because there was no allegation of waiver in the pleadings.

Argument.

Waiver is an affirmative defense and must be pleaded.

Allstate Insurance Company v. Moldenhauer (C. C. A. 7th 1952), 193 F. 2d 663, 665.

It is permissible under the Federal Rules for a party to set forth affirmatively any defense he may have and he is required to do so as to defenses enumerated in Rule 8(c), Federal Rules of Civil Procedure, 28 U. S. C. A.; *Mitchell v. American Republic Insurance Company* (D. C. Iowa 1956), 20 F. R. D. 115, 116.

An affirmative defense must be pleaded to prevent surprise.

Carr v. National Discount Corporation (C. A. Mich. 1949), 172 F. 2d 899, 903.

In pleading an affirmative defense, the pleader need do no more than give the adverse party fair notice of the nature of the defense.

Edmonds v. United States (D. C. Wisc. 1957), 148 Fed. Supp. 185, 186.

While it is not necessary to plead the defense of waiver by name, it is submitted that the pleadings in this matter contain no allegations of acts or conduct constituting

waiver, as defined by the Arizona Supreme Court in *City of Tucson v. Koerber, supra*.

At most, the allegations of Paragraph 8 of Plaintiff's Complaint [pp. 7-8, printed record] raised the issue of estoppel. The Complaint alleges Defendants-Appellants failed to act in a number of respects, although it does not allege any duty to act.

Most important, the Complaint nowhere alleges the intent that is an indispensable element of waiver.

Conclusion.

In the absence of any evidence of waiver, or any allegation thereof in the pleadings, the District Court as a matter of law was precluded from finding that Appellants had waived performance of the conditions precedent to Appellee's right to terminate the Lease and Option to Purchase Agreement.

Under the District Court's other Findings of Fact and Conclusions of Law, the said Lease and Agreement therefore remained in full force and effect until terminated May 31, 1957, by Appellee pursuant to the power to terminate contained therein.

As a result, Appellee is indebted to Appellants in the following amounts:

1. Interest on the sum of Two Thousand Six Hundred Sixteen and 52/100 (\$2,616.52) Dollars from November 8, 1956, to January 8, 1957, at 6% per annum.
2. The sum of One Thousand Three Hundred Thirty and No/100 (\$1,330.00) Dollars together with interest thereon from January 8, 1957, until paid at the rate of 6% per annum.

3. The sum of One Thousand and No/100 (\$1,000.00) Dollars together with interest thereon at the rate of 6% per annum from December 8, 1956, until paid.

4. The sum of One Thousand and No/100 (\$1,000.00) Dollars together with interest thereon at the rate of 6% per annum from January 8, 1957, until paid.

5. The sum of Eight Thousand and No/100 (\$8,000.00) Dollars, representing the regular monthly payment of One Thousand and No/100 (\$1,000.00) Dollars plus the second quarterly payment of Seven Thousand and No/100 (\$7,000.00) Dollars, together with interest thereon at the rate of 6% per annum from February 8, 1957, until paid.

6. The sum of One Thousand and No/100 (\$1,000.00) Dollars together with interest thereon at the rate of 6% per annum from March 8, 1957, until paid.

7. The sum of One Thousand and No/100 (\$1,000.00) Dollars together with interest thereon at the rate of 6% per annum from April 8, 1957, until paid.

8. The sum of Eight Thousand and No/100 (\$8,000.00) Dollars, representing the regular monthly payment of One Thousand and No/100 (\$1,000.00) Dollars plus the third quarterly payment of Seven Thousand and No/100 (\$7,000.00) Dollars, together with interest thereon at the rate of 6% per annum from May 8, 1957, until paid.

For the reasons above-stated, the Judgment of the District Court should be reversed, insofar as it places the termination of the lease prior to December, 1956, and entitles Appellee to funds held in escrow at the Tucson office of The Valley National Bank of Phoenix, and Judgment entered for the Appellants on Count One of

their Amended Counterclaim in the sum of Twenty-One Thousand Three Hundred Fifty-Six and 17/100 (\$21,-356.17) Dollars, together with interest from the due dates, plus costs incurred by Appellants-Defendants in the trial of this matter in the District Court, and costs incurred by Appellants in this appeal.

Respectfully submitted,

GATEWOOD & GREENWAY

McCARTY, CHANDLER & UDALL

By CHARLES C. GATEWOOD

Attorneys for Appellants.

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No. 16222

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

H. GREENWAY ALBERT and MAJA GREENWAY ALBERT,
husband and wife,

Appellants,

vs.

IRA B. JORALEMON,

Appellee.

BRIEF OF APPELLEE.

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FILED

MAY 11 1959

PAUL P. O'BRIEN, CLERK

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No. 16222

IN THE

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husband and wife,

Appellants,

vs.

IRA B. JORALEMON,

Appellee.

BRIEF OF APPELLEE.

To simplify our brief, we will refer to the parties as they appeared in the court below, the appellee Joralemon being the plaintiff and appellants Albert and his wife being the defendants.

Statement of the Case.

Plaintiff does not take the position that defendants' statement of the case is incorrect. He does believe, however, that facts material to his side of the case have been omitted and that in order to give the Court the proper picture such additional facts should be stated. They are as follows:

Plaintiff and defendants were very good personal friends, having been acquainted for almost fifty years. [Tr. 167, 212.] Their dealings were on somewhat of an informal basis. This is evidenced by the fact that Jorale-

mon's letters to Albert are directed to him by his first name and greetings are extended to his wife. [Pltf. Ex. 4, Tr. 134; Pltf. Ex. 5, 138.]

The mining claims covered by the lease and option are located in a barren desert area, remote from any sizable town or city. Possession of the claims would be of no value whatever except to prospect them for minerals. (The Court could take judicial notice of this fact. 20 Am. Jur. 174, Par. 50.)

When plaintiff surrendered the lease and option, by his letter of November 5, 1956 [Pltf. Ex. 4, Tr. 134], he made it clear to defendants that after investigation he had concluded, to his own satisfaction, that there was no valuable mineral in the claims. This he again repeated in his letter of November 16, 1956 [Pltf. Ex. 5, Tr. 138], by which he sent to Albert the logs of the drilling he had done on the claims and in which he states: "I can see no chance that it contains workable ore. * * * I am sorry that we did not succeed in finding ore. We tried hard." Immediately after sending Albert the letter of November 5, 1956, plaintiff vacated the mining claims and never returned to them. [Tr. 135.] Defendants knew that plaintiff was leaving the property and thought that he intended to. [Tr. 208.]

At no time after receiving plaintiff's letter of November 5, 1956, until April 16, 1957, did defendants, or anyone on their behalf, ever say or indicate to plaintiff that delivery of a quitclaim deed and payment in full of all defendants claimed to be due were conditions that must be fulfilled before the lease and option could be considered terminated, although conversations and correspondence were had between the parties between said dates. [Tr. 147-149, 206, 211-212, 215.] In fact, the defendant Al-

bert informed his attorney that he did not want to demand a quitclaim deed. [Tr. 211.]

There is nothing in the evidence to indicate that plaintiff or his agents were not acting in good faith in disputing the amount claimed to be due out of the quarterly payment maturing November 8, 1956. Defendants' counsel concedes that there is no issue of good faith on the part of plaintiff. [Tr. 132.]

Had plaintiff known that it was or was going to be defendants' position that the lease and option could not be terminated until the controversy over the amount due had been settled and the quitclaim deed supplied, he would have promptly supplied the deed and taken such steps as were necessary to settle the controversy. [Tr. 148-149.]

ARGUMENT.

Defendants' appeal is based upon only two Specifications of Error. They are that the trial court erred in making its Finding of Fact No. VII [Tr. 57] and Conclusion of Law No. V [Tr. 61], for the reasons—first that there was no evidence to support such finding or conclusion, and second because there was no allegation of waiver in the pleadings. We will discuss these two propositions in the reverse order in which defendants have discussed them.

The Pleadings and Other Proceedings in the Case Are Sufficient to Sustain the Affirmative Defense of Waiver and Estoppel.

It is our position that the plaintiff's complaint does plead facts sufficient upon which to base the defense of waiver. [See paragraphs 8 and 9 of plaintiff's complaint, Tr. 7-8.] Those paragraphs set forth the acts of the defendants upon which the plaintiff relied to establish waiver and estoppel on the part of defendants. Furthermore, in the

opening statement of counsel for plaintiff it is stated [Tr. 96] that plaintiff would prove facts upon which to base a waiver and estoppel. In addition to the pleadings and statement of counsel, evidence was introduced throughout the trial to establish the existence of a waiver and an estoppel, and no objection was offered to such evidence upon the ground that there were no pleadings to support it and that waiver and estoppel were not an issue in the case. Particular attention is called to the statement of one of counsel for plaintiff [Tr. 148] in discussing certain testimony that was offered. It is there said: "We have a question of waiver and estoppel in connection with this. I think we have a right to prove that Mr. Joralemon stood ready, willing and able to furnish anything that was requested at any time and that he would have done so had it been requested.", and again [Tr. 167] where counsel for plaintiff said: "There is a question of estoppel here and a question of whether Mr. Joralemon was entitled to reply upon Mr. Albert's failure to make a demand." in neither of these instances, nor at any time during the trial, did counsel for defendants object to such evidence on the ground that there was no proper pleading to support it.

It is not necessary that the defense of waiver or estoppel be pleaded by name. If the facts set forth in the pleadings show a waiver or an estoppel, that is sufficient.

See: *Munger v. Boardman*, 53 Ariz. 271, 88 P. 2d 536. The *Munger* case was later referred to by the Supreme Court of Arizona in the case of *Brown v. Beck*, 64 Ariz. 299, 169 P. 2d 855, where the court says:

"But even assuming that the general rule is that a defense of this nature should be specifically pleaded, this court in the very recent case of *Munger vs. Boardman* (53 Ariz. 271), 88 P. (2d) 536, decided

March 27, 1939, but not yet reported (in State report), has held, in effect, that wherever there is any evidence appearing in the record upon which the special defense of estoppel might have been predicated and urged at the trial, this court may itself raise, consider and apply such defense, notwithstanding that it had neither been pleaded nor urged as an issue by either party in the lower court. If this be true, much more does it follow that a defense which appears in the evidence and has been urged in the trial court is permissible, even though it may not have been pleaded.”

The same rule has been adopted by most of the other states. A good example is the case of *Dillard v. Caesar*, 243 P. 2d 356 (Okla.), where the Supreme Court of Oklahoma says:

“It is not essential that waiver be specifically pleaded since the facts to show it were pleaded.”

The same rule has been approved by this Court on a number of occasions. In the case of *James v. Nelson*, 90 F. 2d 910, this Court says:

“The foregoing, we think, is a sufficient pleading of estoppel in Pais. ‘An estoppel arises as a conclusion of law from the facts pleaded, rather than from the mere designation of the act as an estoppel.’ ”

Furthermore, even though there were no pleadings upon which to base the defense, under the provisions of Rule 15(b) of Federal Rules of Civil Procedure it is provided that if there is evidence bearing upon an issue offered and received in the case without objection, upon the ground that there was no sufficient pleading, and if the matter is

thus litigated, it is not material that there were no pleadings upon which to base it. The above rule provides:

“Amendments to conform to the evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, *but failure so to amend does not affect the result of the trial of these issues.* If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.” (Emphasis ours.)

Not only was the matter litigated, but in the opening statement of counsel for plaintiff it was called to the attention of the court and opposing counsel that the question of waiver and estoppel was in the case. This of itself would be sufficient to properly raise the question.

See:

Gipps Brewing Corp. v. Central Manufacturers' Mutual Insurance Co., 147 F. 2d 6.

Vernon Lumber Corp. v. Harcen Construction, 155 F. 2d 348.

It is apparent, therefore, that the pleadings and proceedings in the trial court were ample to support the defense of both waiver and estoppel.

The Evidence Was Sufficient to Sustain the Court's Finding and Conclusion Establishing Waiver.

Rule 52(a) Federal Rules of Civil Procedure provides that in actions tried to the court without a jury, or where a jury verdict is advisory only, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses. * * * " There was ample evidence of an intent in the part of the defendants to waive the provisions of the contract requiring payment of all sums due from plaintiff to defendants and the tender of a quitclaim deed before termination of the contract. To begin with, the plaintiff called attention to the defendant, Greenway Albert, in plaintiff's letter of November 5, 1956, that no quitclaim deed was included with plaintiff's notice of termination. No objection was raised by Albert to this omission, and a few days later when he asked plaintiff to give him the logs of the drilling that had been done on the mining claims he did complain about the amount that had been paid by the plaintiff but made no complaint whatsoever of plaintiff's failure to submit the quitclaim deed. Negotiations and correspondence were carried on for several weeks in arriving at the amount due and ultimately paid defendants by plaintiff, but in none of such negotiations or correspondence did the defendants, or their agents, ever raise any question or complaint about plaintiff's failure to deliver a quitclaim deed, nor did they at any time, until the letter of defendant's counsel, dated April 16, 1957, was written, ever indicate that they were taking, or were going to take, the position that the lease and option had not been terminated. That Albert had thoroughly in mind the fact that he had the right to demand a quitclaim deed can not be doubted. Some time about November, 12, 1956, [Tr. 209], shortly after receipt

of plaintiff's letter of termination, Albert discussed with his attorney the right to demand a quitclaim deed, and was informed by his attorney that he had the right to demand it. Instead of demanding it, he informed his counsel that he did not want to demand a deed. Clearly this statement alone is sufficient evidence upon which the court could find that the defendants had waived their right to demand the deed. It was obvious to the trial court that defendants had no need for the deed. The lease and option had never been recorded. [See Pltf.'s Ex. 3—Tr. 116-130].

Immediately upon writing defendants that he was surrendering the property plaintiff vacated it and never went back to it. Therefore, at all times thereafter the defendants not only had possession but had a clear title to the property, and a quitclaim deed would have been of no use whatever to them. With these conditions existing, it is difficult to see how the court could have failed to find that defendants intentionally waived their right to demand something which would have been useless to them.

We can not agree with the argument of counsel for defendants to the effect that under the law of Arizona waiver must be based upon a consideration. There is some language to that effect in the case of *Davis v. Standard Accident Insurance Company*, 35 Ariz. 392, 278 Pac. 384, cited by defendant. However, that does not seem to be the law as applied in subsequent cases in the Supreme Court of Arizona. In the case of *Waugh v. Lennard*, 69

Ariz. 214, 211 P. 2d 806, the Supreme Court of Arizona says:

“Waiver is defined as a voluntary and intentional relinquishment of a known right, Home Owners’ Loan Corp. v. Bank of Arizona, 54 Ariz. 146, 94 P. (2d) 437.”

Other Arizona cases where the doctrine of waiver has been applied without consideration are:

Lee v. Nichols, 81 Ariz. 106, 301 P. 2d 1022;

Onekama Realty Co. v. Carothers, 59 Ariz. 416, 129 P. 2d 918;

Pima Farms Co. v. Fowler, 32 Ariz. 331, 258 Pac. 256;

Stark v. Norton, 24 Ariz. 454, 211 Pac. 66.

In the *Onekama* case, *supra*, the Court, in discussing the doctrine of waiver resulting from the conduct of a party, stated:

“The rule above stated is obviously based on the equitable principle that when one has lulled another into security by his conduct he cannot take advantage of such conduct until he has given an opportunity to the deceived party to restore the status quo * * * .”

Certainly in the instant case there is evidence from which the trial Court was justified in finding that the defendants knew their rights and intentionally relinquished them, and further that plaintiff was, by defendants’ conduct, lulled into a sense of security and was not afforded any opportunity to restore the *status quo*. Once the waiver had been accomplished and the time had passed for the

accrual of a further quarterly payment (February 8, 1957), it was impossible for the original *status quo* to be restored. Under these circumstances the trial court properly found a waiver had taken place.

We believe, therefore, that both the pleadings and the evidence were sufficient to justify the trial court in its finding and conclusions with respect to waiver and that the judgment should, therefore, be affirmed.

Additional Reasons for Sustaining the Judgment of the Lower Court.

If this Court should reach the conclusion that the judgment can not be affirmed on the ground of waiver, there is ample evidence in the record to support an affirmance of the judgment on other grounds.

It seems to be well settled law that if there is any ground on which the lower court may be sustained the judgment must be affirmed although the ground or reason assigned for the action of the trial court may not be sustainable. If the result is correct, the judgment should be sustained if there is any ground upon which the appellate court can do so. In *5B C. J. S., Appeal and Error, Section 1849*, page 287, it is stated.

“Where there is any ground on which the action of the lower court may be sustained, the judgment may or must be affirmed although the ground or reason assigned for the action of the court may not be sustainable. A ruling or judgment of the lower court which is not based on any specific ground will not be reversed if it can be supported on any ground.”

This rule has been followed, and the particular text above quoted has been cited with approval by this Court in an opinion written by Judge Mathews in the case of *L. McBrine Co. v. Silverman*, 121 F. 2d 181, wherein it was said:

“We affirm the dismissals; not, however, on the ground assigned by the trial court, but on the ground that no infringement was shown. That we may affirm on a ground not assigned by the trial court is well settled. (*Collier v. Stanbrough*, 6 How. 14, 21, 12 L. Ed. 324; *Frey & Son v. Cudahy Packing Co.*, 256 U. S. 208, 210, 41 S. Ct. 451, 65 L. Ed. 892, 3 Am. Jur., Appeal and Error §1163, p. 674; 5 C. J. S., Appeal and Error, §1849, pp. 1334, 1335.”

In view of this rule, we feel we are justified in pointing out to this Court other grounds upon which the judgment of the lower court should be sustained.

The trial court found that the failure to deliver the quitclaim deed promptly after November 5, 1956, was occasioned by an oversight of John W. Hamilton, Secretary of Homestake Mining Company, or some other officer or agent of that company. We believe that the principal reason why the quitclaim deed was not delivered was because defendants by their conduct had done everything to induce the plaintiff and his agents and representatives to believe that no deed was or would be required. Under such circumstances we think the court should clearly have applied the doctrine of equitable estoppel.

Had the lease remained effective, no rentals would have accrued between November 8, 1956, and February 8, 1957,

at which latter date \$7,000.00 would have become due; on May 8, 1957, another \$7,000.00 would have become due. [Pltf. Ex. 3, Tr. 116, 122]. In view of this payment schedule, certain dates and events are significant:

- November 5, 1956 Plaintiff sent his notice of termination.
- November 12, 1956 Defendant, after receiving plaintiff's letter, consulted his attorney regarding it and told him he did not want to demand any quitclaim deed.
- November 16, 1956 Defendant called plaintiff, having discussed the matter with his attorney, and discussed plaintiff's letter and, knowing that plaintiff intended by the letter to terminate the lease and to move out of the property, asked plaintiff for the drill logs, but made no mention whatever of any deed and made no mention whatever of any intention to hold plaintiff to the lease until payment of the exact amount due and delivery of the deed.
- April 16, 1957 The defendant, over five months after plaintiff's attempted termination, had his attorney send the letter which is Plaintiff's Exhibit 7, which letter was the first outward indication from the defendant that he took the position that the lease was in effect until the exact and proper payment had been made and the quitclaim deed had been delivered.

Reviewing what transpired after receipt of the letter from defendants' counsel, of April 16, 1957, it is apparent that defendants either deliberately refrained from indicating that they would require a quitclaim deed in order to permit the time to go by and additional payments to accrue under the lease and option as if it were still in effect, or, as the trial court found, they intentionally

waived their right to the deed and then subsequently sought to withdraw their waiver and attempt to collect a large sum as rental for the period that had expired in the meantime. To permit defendants to take advantage of their silence under such circumstances would be most inequitable. The plaintiff no longer had possession of the property. He received nothing of value whatever for the additional thousands of dollars the defendants are now trying to claim, nor did the defendants give up or lose anything of value. They could have worked their claims or sold or disposed of them in any manner they saw fit the moment they received plaintiff's first letter surrendering possession.

The evidence in the trial was undisputed to the effect that had plaintiff known or suspected that defendants were going to insist upon settlement in full of their claim and delivery of a quitclaim deed as conditions to terminating the lease and option, plaintiff would have promptly complied. In other words that plaintiff relied upon the silence of defendants is undisputed and is further reason for the application of the doctrine of estoppel.

There are numerous cases decided by the Supreme Court of Arizona, and other courts, applying the doctrine of estoppel under such circumstances.

As an example see:

Willard Helburn, Inc. v. Spiewak, 180 F. 2d 480;

Bettleheim v. Hagstrom Food Stores, Inc., 249 P. 2d 301 (Cal.);

Johnson v. Neel, 229 P. 2d 939 (Colo.);

Keylon v. Arnold, 209 S. W. 2d 459 (Ark.);

Bond v. Wiegardt, 219 P. 2d 196 (Wash.);

Green v. Gila Water Co., 36 Ariz. 303, 285 P. 263.

A statement contained in a recent case decided by the Supreme Court of Arizona, *Holmes v. Graves*, 83 Ariz. 174, 318 P. 2d 354, is particularly applicable to the fact situation in this case. There the court says:

“Estoppel will be applied to prevent injustices, *Munger vs. Boardman*, 53 Ariz. 271, 88 P. (2d) 356, and to transactions in which it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced. 19 *Am. Jur.* 676, *Estoppel*, Section 62.”

Certainly the defendant, on November 12, 1956, November 16, 1956, November 21, 1956 (the dates he discussed the matter with his attorney, talked to the plaintiff on the telephone, and had his attorney write a letter discussing the proper amount of the November 8 payment) acquiesced in the treatment of the lease and option as having been terminated on November 5, 1956. We sincerely believe that to allow him, after an additional \$7,000.00 rental had accrued, to maintain a position inconsistent with the one in which he acquiesced would be unconscionable, and under the law of the State of Arizona he should be estopped to maintain such inconsistent position, and, therefore, the trial court's judgment grants the defendants all the relief to which they could be entitled.

We also believe that the court was in error in holding as a conclusion of law that the execution, acknowledgment and delivery to the defendants of a quitclaim deed was a condition precedent to the exercise by plaintiff of his option to terminate the contract. Courts are generally disinclined to construe stipulations in a contract as conditions precedent unless compelled to do so by language of the contract plainly expressed and where to do so would result in injustice.

See:

San Diego Construction Co. v. Mannix, 166 Pac. 325 (Cal.);

Kelp Ore Remedies Corp. v. Brooten, 277 Pac. 716 (Ore.);

Superior Portland Cement v. Pacific Coast Cement Co., 205 P. 2d 597 (Wash.).

When called upon to construe such a provision the California Supreme Court stated:

“However, it is the general rule in contract interpretation that stipulations in an agreement are not to be construed as conditions precedent unless such construction is required by clear, unambiguous language; and particularly so where a forfeiture would be involved or inequitable consequences would result. * * * It is significant that there is no similar conditional wording here in the parties’ ‘submission agreement.’ If the parties had intended that in the event the arbitration award was made at a time when wage board approval was required and that such approval should be a condition precedent to effectiveness, they could have expressly specified that *only* if so approved, would the award become effective; but not having used the word *only*, they reasonably could be assumed to have intended, as the trial court concluded, that the award would become effective if given such approval *or* on such approval becoming unnecessary.”

Alpha Beta Food Markets v. Retail Clerks Union, 291 P. 2d 433; certiorari denied 76 S. Ct. 545, 350 U. S. 996.

On this point the Tenth Circuit Court quoted Williston on Contracts as follows:

“In determining such a question at the present time little stress would be laid on refinements; rather the court would endeavor to interpret the meaning of the words used according to general principles of interpretation. A special rule of construction was established by the early cases which still might have some weight in case of ambiguity. If the performance which is urged to be a condition was also the subject-matter of a promise by the party from whom the performance was due, so that even though the words were not treated as words of condition there is a remedy to secure the performance of the act, the construction will be favored that no condition is meant; while on the other hand, if there will be no remedy to secure the performance of the act in question, unless the words can take effect as words of condition, because the contract contains no promise to render the performance, the construction will be given that the words create a condition. ‘Courts are disinclined to construe the stipulations of a contract as conditions precedent, unless compelled by the language of the contract plainly expressed. The reason of this disinclination is that such a construction prevents the court from dealing out justice to the parties according to the equities of the case’. Williston on Contracts, §671.”

Southern Surety Co. v. MacMillan Co., 58 F. 2d 541; certiorari denied 58 S. Ct. 18, 287 U. S. 617, 77 L. Ed. 536.

Paragraph 3 of the lease and option [Tr. 119], expressly provides that plaintiff would be obligated to make

the November 8, payment regardless of the date of termination, and paragraph 13 of the lease and option [Tr. 125] expressly requires plaintiff to furnish to defendants a formal release *upon request*. Defendants, therefore, had a remedy in the event plaintiff failed to make such payment or to deliver a release or quitclaim deed. The court was not compelled by plainly expressed language to construe these undertakings as conditions precedent. Performance of each of these acts was also the subject matter of a promise by plaintiff so that defendants had a remedy to enforce each of them. Under such circumstances the court should have held that neither the payment of the first quarterly payment nor the delivery of a quitclaim deed was a condition precedent to the right of termination.

If the lease and option is so construed, the trial court's judgment grants the defendants all the relief to which they could be entitled.

Conclusion.

We think it clear that the judgment of the trial court should be affirmed because:

1. The trial court properly found that defendants had waived their right to insist upon payment of the first quarterly installment and delivery of a quitclaim deed as conditions precedent to termination.

2. Under the evidence the defendants were estopped to treat the performance of said acts as conditions precedent.

3. The requirement of performance of said acts under the lease and option should not be construed as conditions precedent.

Respectfully submitted,

BOYLE, BILBY, THOMPSON & SHOENHAIR,
Attorneys for Appellee.

No. 16222

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

H. GREENWAY ALBERT and MAJA GREENWAY ALBERT,
husband and wife,

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Appellee.

REPLY BRIEF OF APPELLANTS.

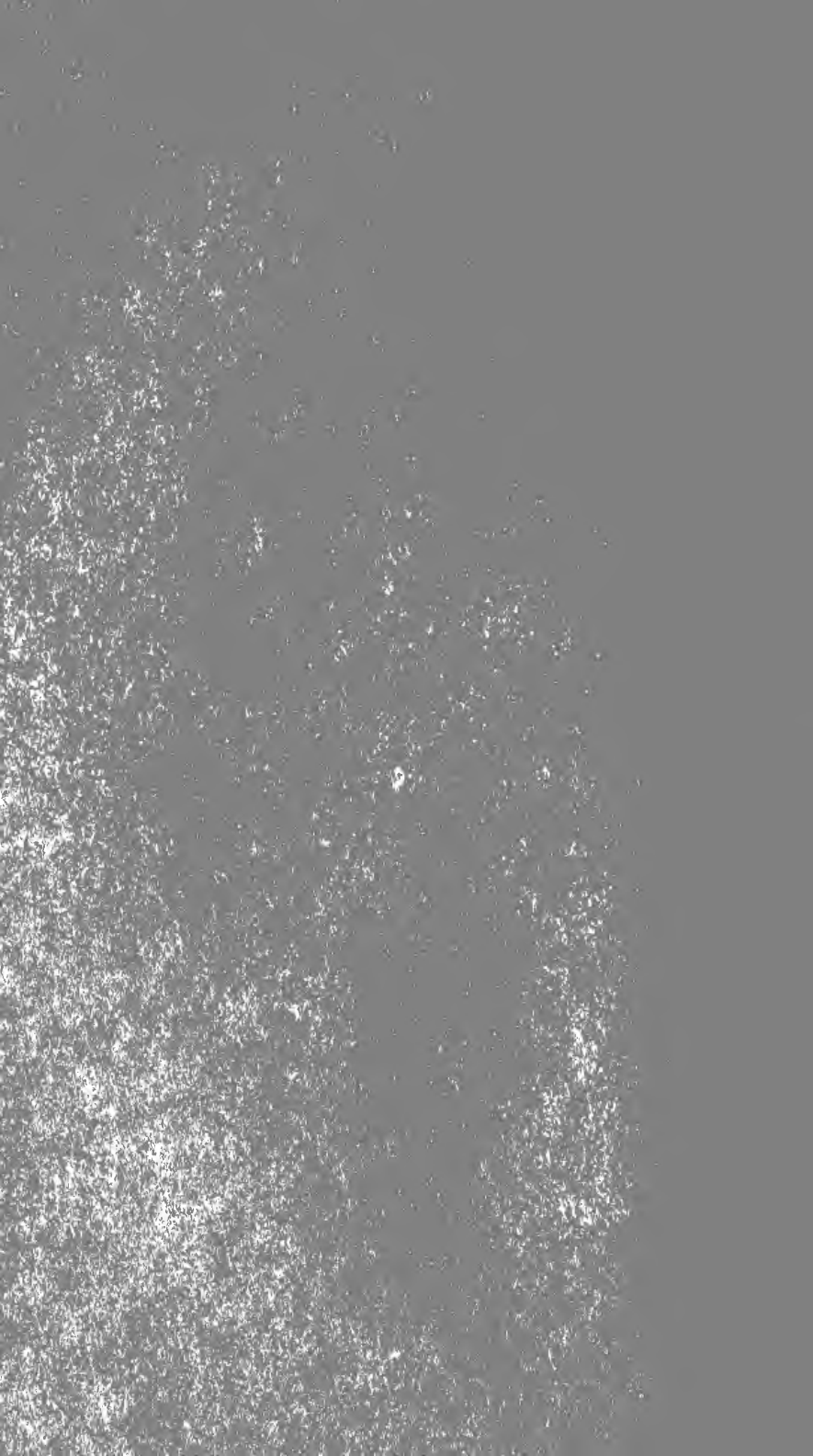
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No. 16222

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

H. GREENWAY ALBERT and MAJA GREENWAY ALBERT,
husband and wife,

Appellants,

vs.

IRA B. JORALEMON,

Appellee.

REPLY BRIEF OF APPELLANTS.

The following abbreviations are used throughout:

“Op. Br.” for opening brief of appellants; “Ans. Br.”
for brief of appellee; “Tr.” for printed record.

In order to answer the brief of appellee, the designation therein of the parties as they appeared in the court below, the appellee Joralemon being the plaintiff and the appellants Albert and his wife being the defendants, is adopted for this reply brief.

Statement of the Case.

Defendants take exception to plaintiff's statement of additional facts (Ans. Br. 1-3) as follows:

1. Plaintiff states (Ans. Br. 1) that dealings between him and defendants "were on somewhat of an informal basis," as evidenced by the first-name salutation in two letters [Tr. 134, 138] and the extension of greetings to Mrs. Albert [Tr. 138]. In determining the degree of formality of the dealings at issue, these amenities must be weighed against the fact that the lease and option to purchase [Tr. 116-129] was executed only after execution of two preliminary agreements [Tr. 109-115], and extended negotiations between attorneys for the parties. See testimony of Robert E. Driscoll, Jr., of Lead, South Dakota, attorney for plaintiff [Tr. 167, 168], who traveled to Tucson, Arizona, for preliminary negotiations with defendants' attorneys [Tr. 168], prepared a proposed agreement [Tr. 183, 184] and the lease and option to purchase as executed [Tr. 189, 190].

2. The proposition that this Court can take judicial notice of the value of the mining claims covered by the lease and option is not supported by law, including the authority cited by plaintiff (Ans. Br. 2).

3. Plaintiff's statement that he "surrendered the lease and option, by his letter of November 5, 1956" (Ans. Br. 2) is a legal conclusion contrary to the trial Court's Conclusions of Law II and IV [Tr. 61] that the first quarterly payment and quitclaim deed were conditions precedent to the exercise by the plaintiff of his option to terminate.

It is submitted further that the other additional facts stated by plaintiff are not material to the questions involved in defendants' Specifications of Errors (Op. Br. 7).

ARGUMENT.

Summary.

Plaintiff has divided the Argument in his answering brief into three sections. The first two purport to answer defendants' opening brief. These sections fail to accomplish their purpose because of plaintiff's failure to recognize the distinction between waiver and estoppel made by the Supreme Court of Arizona in the cases of *The Equitable Life Assurance Society v. Pettid*, 40 Ariz. 239, 11 P. 2d 833, and *Waugh v. Lennard*, 69 Ariz. 214, 211 P. 2d 806, cited and quoted by defendants (Op. Br. 9, 10).

Reply to Plaintiff's Argument That the Pleadings and Other Proceedings in the Case Are Sufficient to Sustain the Affirmative Defense of Waiver and Estoppel.

Plaintiff's reluctance to distinguish between the defenses of waiver and estoppel, and failure to face up to the true issues presented by defendants' opening brief is evident from the caption and opening sentences of the first section of plaintiff's argument. Plaintiff's tendency to use the terms wiaver and estoppel interchangeably is reflected in the caption (Ans. Br. 3). Plaintiff and defendants agree that the Supreme Court of Arizona has defined waiver "as a voluntary and intentional relinquishment of a known right" (Ans. Br. 9; Op. Br. 10). Paragraphs 8 and 9 of plaintiff's complaint, which plaintiff argues contain facts sufficient upon which to base the defense of waiver (Ans. Br. 3), fail to allege any facts constituting a voluntary and intentional relinquishment of a known right. The portion of the opening statement of plaintiff's counsel which plaintiff cites (Ans. Br. 4) as stating facts upon which to base a waiver and estoppel

[Tr. 96] fails to allege any facts meeting the test supplied by the Arizona Court's definition of waiver. Plaintiff calls "particular attention" to the use by one of his counsel of the word "waiver" in discussing certain testimony that was offered (Ans. Br. 4), and well he might. It is the only place that the word appears in the pleadings or the transcript of proceedings at pre-trial conference or trial. However, the word is used in conjunction with estoppel; the next sentence quoted in plaintiff's brief shows that his counsel was talking only about estoppel and is further evidence of plaintiff's mistaken tendency to consider the two as identical. In this context, the utterance by plaintiff's counsel of the word "waiver" cannot be held to have given defendants adequate notice that the issue of waiver was to be tried.

Plaintiff cites and quotes Rule 15(b) of Federal Rules of Civil Procedure and emphasizes the provision that failure to amend does not affect the result of the trial of issues not raised by the pleadings. He then contends that the question of waiver was litigated (Ans. Br. 6). The best evidence that the question was not litigated, and that the defense of waiver had not even occurred to plaintiff long after the trial, is the Findings of Fact and Conclusions of Law proposed by plaintiff [Tr. 34-42] and filed more than three months after the trial [Tr. 42]. Plaintiff proposed no findings of fact amounting to waiver and no conclusions of law on the issue, yet argues now that the matter was litigated.

Plaintiff's complaint does not plead facts amounting to waiver, and there was no trial of the issue.

Reply to Plaintiff's Argument That the Evidence Was Sufficient to Sustain the Court's Findings and Conclusion Establishing Waiver.

The second section of plaintiff's argument consists primarily of unsupported conclusions. Plaintiff's statement that "there was ample evidence of an intent in (*sic*) the part of the defendants to waive the provisions of the contract requiring payment of all sums due from plaintiff to defendants and the tender of a quitclaim deed before termination of the contract" (Ans. Br. 7) is followed by a list of facts casting no light whatsoever on defendants' intent. Plaintiff argues that the statement by defendant Albert to his attorney that he did not want to demand a quitclaim deed, made one week after being assured by plaintiff that the deed would be sent as soon as practicable [Tr. 134], alone is sufficient evidence of an intentional relinquishment of defendants' right to demand the deed (Ans. Br. 8). Standing alone, the fact that defendant Albert at that time did not want to demand a quitclaim deed is no evidence of an intentional relinquishment of such a right. His immediate concern was the favorable settlement of a dispute over the remittance made by plaintiff a week earlier, and he had been assured that the deed would be forthcoming. Certainly a demand for the deed, in the face of this assurance, would have hindered negotiations concerning the disputed remittance. The attorney to whom the statement was made did not construe it as evidencing any intention to relinquish the defendants' right to receive the quitclaim deed. On the contrary, he informed defendant Albert three months later that Albert could not do any business with other people interested in the property because his lease was still in effect until he received the quitclaim deed [Tr. 210].

Plaintiff's unsupported conclusion that "it was obvious to the trial court that defendants had no need for the deed" and that "a quitclaim deed would have been of no use whatever to them" (Ans. Br. 8) is refuted by the above, and the existence of the provision requiring the execution, acknowledgment, and delivery of such a deed in the lease and option [Tr. 119].

Defendants did not base the argument in their opening brief on the absence of consideration for the alleged waiver, as suggested by plaintiff (Ans. Br. 8). Defendants' argument on the lack of evidence of waiver is completely in harmony with the definition expressed in *Waugh v. Lennard, supra*, and quoted by plaintiff (Ans. Br. 9).

Plaintiff has introduced and attempted to apply to the present case an equitable principle quoted from the case of *Onekama Realty Co. v. Carothers*, 59 Ariz. 416, 129 P. 2d 918 (Ans. Br. 9). The quotation begins:

"The rule above stated is obviously based on the equitable principle . . ."

Plaintiff neglected to quote the "rule above stated" from the *Onekama* case, *supra*. The rule referred to is

"that a vendor who has accepted payments after they are due cannot thereafter insist upon strict performance of the contract unless and until he notifies the vendee of such intent and gives a reasonable time for the vendee to bring his payments up to date."

Neither the rule nor the principle has application to the present case.

The second section of plaintiff's argument fails to establish a sufficiency of evidence to sustain the trial court's finding and conclusion of waiver.

Reply to Plaintiff's Argument of Additional Reasons for Sustaining the Judgment of the Lower Court.

Plaintiff argues that in any event the judgment should be affirmed by either applying the doctrine of equitable estoppel, or by holding that neither the payment of the first quarterly payment nor the delivery of a quitclaim deed was a condition precedent to the right of termination, contrary to the trial court's Findings of Fact III, XV and XVI [Tr. 56, 60].

Plaintiff acknowledges the rule that "findings of fact shall not be set aside unless clearly erroneous" (Ans. Br. 7).

In the case of *Evans v. Mason*, 82 Ariz. 40, 308 P. 2d 245, the Supreme Court of Arizona states:

"An essential element of equitable estoppel is that the adverse party must have relied upon the conduct."

Plaintiff argues that the quitclaim deed was not delivered "because defendants by their conduct had done everything to induce the plaintiff and his agent and representative to believe that no deed was or would be required" (Ans. Br. 11) and "that plaintiff relied upon the silence of defendants is undisputed" (Ans. Br. 13). The argument is refuted by plaintiff's own testimony in the trial court (Op. Br. 14, 15). Plaintiff knew that the deed was required, and asked that it be taken care of by John W. Hamilton, secretary of Homestake Mining Company, whose oversight occasioned the failure to deliver the deed.

The lease and option itself [Tr. 119], and the testimony of plaintiff [Tr. 156-157] and his attorney [Tr. 194] are ample evidence in support of the trial court's Finding of Fact III [Tr. 56] and conclusion that the payment of the first quarterly payment and the delivery of the quitclaim deed were conditions precedent to the right of termination.

Conclusion.

Plaintiff, by arguing that allegations of estoppel are sufficient to raise the question of waiver, and by ignoring the necessity of evidence of intention to relinquish a right before there can be any finding of waiver of such right, has not made it necessary to bolster the position taken by defendants in the Conclusion of the Opening Brief of Appellants. That position is reasserted by reference herein.

Respectfully submitted,

GATEWOOD & GREENWAY,
McCARTY, CHANDLER & UDALL,
By CHARLES C. GATEWOOD,
Attorneys for Appellants.

No. 16223 ✓

**United States
Court of Appeals**
for the Ninth Circuit

SUN-MAID RAISIN GROWERS OF CALIFORNIA, a Corporation,

Appellant,

vs.

CALIFORNIA PACKING CORPORATION, a Corporation,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California
Northern Division.**

FILED

FEB 25 1959

PAUL P. O'BRIEN, CL.

No. 16223

United States
Court of Appeals
for the Ninth Circuit

SUN-MAID RAISIN GROWERS OF CALIFOR-
NIA, a Corporation,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, in and
for the Southern District of California, North-
ern Division

In Equity No. C-104—M

CALIFORNIA PACKING CORPORATION, a
Corporation,

Complainant,

vs.

SUN-MAID RAISIN GROWERS OF CALIFOR-
NIA, a Corporation,

Defendant.

BILL OF COMPLAINT

To the Honorable, the Judges of the District Court
of the United States for the Southern District
of California, sitting as a Court of Equity:

Comes now California Packing Corporation, com-
plainant above named, and for cause of action
against the defendant above named complains and
alleges as follows:

I.

That complainant is, and at all the times herein
mentioned since on or about the 19th day of Oc-
tober, 1916, has been, a corporation organized and
existing under and by virtue of the laws of the
State of New York, a citizen of said state and a
resident of said state.

II.

That defendant is, and at all the times herein

mentioned [2*] since on or about and prior to the 8th day of November, 1923, has been, a corporation organized and existing under and by virtue of the laws of the State of California, a citizen of said state and a resident of the County of Fresno, in the Southern District of California.

III.

That this is a suit of a civil nature in equity wherein the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars (\$3,000), and is between citizens of different states.

IV.

That complainant is engaged in the business of selecting, preparing and marketing foods and ingredients of foods, and is the successor in business of The J. K. Armsby Company, a corporation organized under the laws of the State of Illinois and heretofore having an office and place of business in Chicago, Illinois, and in San Francisco, California, and said The J. K. Armsby Company carried on a business similar to that of complainant and created a very valuable good-will in connection therewith. That the said business and good-will of said The J. K. Armsby Company were assigned to and taken over by complainant on or about the 8th day of November, 1916, and all properties and rights in connection therewith, including all trade-marks, were duly assigned to and taken over by complainant, and complainant has ever since continued to own and carry on said business.

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

V.

That in or about the year 1903, said The J. K. Armsby Company, in contemplation of the efforts to be made in introducing and popularizing food products selected, prepared and marketed by it, created, adopted, applied and used as a trade-mark to [3] indicate the origin and genuineness of said food products the designation Sun-Kist, and thereafter continued so to use said trade-mark Sun-Kist until the business of said The J. K. Armsby Company was taken over by complainant as aforesaid, and thereafter and ever since said application and use of said trade-mark has been continued by complainant.

That the goods upon which said The J. K. Armsby Company and complainant have used, and complainant now uses, said trade-mark Sun-Kist comprise a great many kinds and varieties of food products, including canned fruits, canned vegetables, catsup, jam, jelly, canned fish and other goods specifically mentioned in the sundry certificates of registration hereinafter mentioned.

VI.

That the said goods to which complainant's said predecessor, The J. K. Armsby Company, applied its said trade-mark Sun-Kist were carefully selected and prepared and were of superior excellence, and great energy and very large expenditures of money were devoted to introducing said goods so marked and acquainting the public with the merits thereof, with the result that long prior to the 10th day of

March, 1917, as well as ever since, the reputation and consequent demand for said Sun-Kist food products had and has been very widely extended and well established throughout the United States and many other parts of the civilized world, and said trade-mark Sun-Kist had acquired and has ever since had, in connection with said goods, an established meaning as indicating that the food product upon which it appeared embodied the skill, care and probity prevailing in the business of complainant's said predecessor and of complainant. [4]

VII.

That said trade-mark Sun-Kist has been registered in the United States Patent Office by complainant's said predecessor, The J. K. Armsby Company, and complainant is now the proprietor of the following certificates of registration covering said trade-mark Sun-Kist, to wit:

- No. 67,278 January 28, 1908.
- No. 67,478 February 4, 1908.
- No. 96,082 April 7, 1914.
- No. 96,385 April 21, 1914.
- No. 96,770 May 5, 1914.
- No. 99,835 September 22, 1914.
- No. 101,121 November 17, 1914.
- No. 101,439 December 15, 1914.
- No. 102,354 February 9, 1915.
- No. 104,684 June 8, 1915.
- No. 113,219 October 10, 1916.

Complainant hereby offers to produce each and all of said certificates as and when this Honorable Court may deem proper.

VIII.

That from the beginning, the business of preparing and marketing food products under said trade-mark Sun-Kist has been a developing one, additional kinds and varieties of food products being from time to time added to the kind and varieties being prepared and sold in said business, with the result that many kinds and varieties of such food products have been prepared and sold under said trade-mark Sun-Kist in very large quantities for more than twenty years, and other kinds and varieties of food products have been prepared and sold under said trade-mark for shorter periods, and, in the case of still other kinds and varieties, preparations for the packaging and sale have been made without any considerable amount of the goods yet being marketed, the history and the policy of the business having been, and being, to develop and extend the business by the preparation and sale of additional [5] varieties of food products as rapidly as the circumstances and the energies and resources of complainant and its predecessor permitted.

IX.

That heretofore, to wit, on or about the . . day of January, 1915, the California Associated Raisin Company, a corporation, then engaged in business in the State of California and elsewhere, commenced

to use the trade-mark Sun-Maid in connection with raisins, and said The J. K. Armsby Company, said predecessor of complainant, thereupon, and on or about the . . day of June, 1915, brought suit in the United States District Court, in and for the Southern District of New York, against two individuals residing in the said district of New York who were at that time using said trade-mark Sun-Maid in said district in connection with the sale of raisins which had been produced by said California Associated Raisin Company and sold to said individuals by said California Associated Raisin Company; that in said suit said The J. K. Armsby Company claimed that said use was an infringement upon the rights of said The J. K. Armsby Company in, to or in connection with said trade-mark Sun-Kist belonging to said The J. K. Armsby Company, and that company, in said suit, prayed for an injunction against the said defendants using said trade-mark Sun-Maid.

That thereafter and on or about the 8th day of November, 1916, said The J. K. Armsby Company assigned and transferred to complainant, as aforesaid, all of its rights to use the said trade-mark Sun-Kist and all of its interest in and to said suit.

That thereafter and on or about the 10th day of March, 1917, and while said suit was pending in said court, the said California Associated Raisin Company desiring that its right to [6] use the said trade-mark Sun-Maid, in connection with packages containing raisins or on packages containing food

products or confections made wholly or in part from raisins, should be established as against said The J. K. Armsby Company and complainant, and to that end, desiring to procure a dismissal of said suit, entered into a written agreement with complainant and said The J. K. Armsby Company and others wherein and whereby it was covenanted and agreed by all said parties to said agreement that said suit should be dismissed and that no claim should ever be made thereafter by the said The J. K. Armsby Company, or by complainant, to the effect that the said trade-mark Sun-Maid, when used in connection with the packing and sale of raisins and other food products and confections containing raisins, interfered with the trade-mark Sun-Kist formerly owned and used by the said The J. K. Armsby Company, and then, at the time said agreement was so entered into, owned and used by complainant: and in consideration thereof, the said California Associated Raisin Company on its part covenanted and agreed in and by said agreement that it would use the said trade-mark Sun-Maid "only on packages containing raisins or on packages containing food products or confections made wholly or in part from raisins," and that if it, the said California Associated Raisin Company, should sell or assign said trade-mark Sun-Maid, the buyer or assignee should only have the right to use the said trade-mark "to the extent" that said California Associated Raisin Company had "the right to use the same," under said agreement. It was furthermore provided in said agreement that nothing therein contained should be con-

strued to require the said The J. K. Armsby Company or complainant to relinquish its right to the use of the said trade-mark Sun-Kist in connection with the packing and sale of raisins or other food products.

That complainant and said The J. K. Armsby Company [7] caused said suit to be dismissed in accordance with said agreement on or about the 18th day of April, 1917, and said contract has ever since been, and is now, in full force and effect, and complainant and said The J. K. Armsby Company have ever duly performed all of the conditions of said contract on their part, or on the part of either of them, to be performed.

X.

That from the time of the making of said contract of March 10, 1917, said California Associated Raisin Company continued to carry on its said business under its said name until the 17th day of February, 1922, on which day it changed its name to Sun-Maid Raisin Growers, and thereafter said corporation, under the name of Sun-Maid Raisin Growers, continued to carry on said business until on or about the 8th day of November, 1923, at which time it assigned and transferred unto Sun-Maid Raisin Growers of California, defendant herein, its right, title and interest in and to said trade mark Sun-Maid, together with the business and goodwill thereof of said Sun-Maid Raisin Growers, in connection with which business and goodwill said trade mark was then being, or had been, used, and said

Sun-Maid Raisin Growers thereupon went out of business and has ever since continued to do no business. That the defendant has ever since carried on, and does now carry on, said business. That said Sun-Maid Raisin Growers of California, the defendant herein, by virtue of said assignment and transfer from said Sun-Maid Raisin Growers, acquired and has ever since owned, and now owns, the said trade mark Sun-Maid as the use thereof was agreed upon and limited as aforesaid in and by said agreement of March 10, 1917, and said California Associated Raisin Company or said Sun-Maid Raisin Growers of California has never acquired and never owned [8] greater right to the use of said trade mark Sun-Maid that was agreed upon and limited by said agreement as aforesaid.

That thereafter, to wit, on or about the 1st day of January, 1929, the defendant, in violation of complainant's rights as aforesaid, began to use, has ever since continued to use, and is now using, said trade mark Sun-Maid upon large quantities of canned goods, canned fruits, canned vegetables, catsup, jam, jelly, canned soup and upon many other food products, all of which are articles of foods and ingredients of foods, and essentially of the same class and particular description as the goods selected, prepared and marketed by said The J. K. Armsby Company or by complainant under the trade mark Sun-Kist at the time said agreement of March 10, 1917, was entered into, and for a long time prior thereto and ever since. That said defend-

and has sold, or caused to be sold, and is now selling, or causing to be sold, large quantities of said goods throughout the United States and elsewhere under the said trade mark Sun-Maid.

That on or about the 4th day of March, 1929, complainant notified the defendant that its said use of said trade mark Sun-Maid, in connection with said canned goods, canned fruits and food products, other than raisins or confections made wholly or in part from raisins, was contrary to defendant's rights and obligations and in violation of complainant's rights under said agreement of March 10, 1917, and complainant demanded that defendant desist from continuing said use. Thereafter and on the 15th day of March, 1929, the defendant notified complainant that said agreement was not binding upon it, but was binding only, if at all, upon the said California Associated Raisin Company, and defendant refused to desist or discontinue its said violations of said contract, but, on the contrary, asserts the right to [9] continue the same, and it has ever since continued to and does now use said trade mark Sun-Maid upon large quantities of canned goods, canned fruits, canned vegetables, catsup, jam, jelly, canned soup and many other food products or confections not made wholly or in part from raisins, and unless enjoined by this Honorable Court defendant will continue to market and sell, or cause to be marketed and sold, large quantities of said food products other than raisins or confections made wholly or in part from raisins through-

out the United States, to the great and irreparable damage and injury of complainant.

XI.

That the word or words Sun-Kist and Sun-Maid closely resemble each other in sound and suggestiveness in connection with foods and food products, and the name Sun-Maid is frequently mistaken for and confused with the name or trade mark Sun-Kist owned by complainant and used in connection with the sale of its goods as aforesaid. That the use of said trade mark Sun-Maid would and does deceive the public and cause purchasers to buy the goods of defendant in the belief that the said goods are the Sun-Kist goods of complainant, long known and in demand as aforesaid, and as and for the goods of complainant, and the use thereof has promoted, and will promote, mistake, confusion and fraudulent substitution, and the division, diversion and destruction of complainant's good-will and business aforesaid, and will jeopardize the good-will and reputation which complainant has built up through many years of effort and large expenditures of money as aforesaid.

XII.

That the value of the good-will of complainant's business of preparing and marketing its food products under its said [10] trade mark Sun-Kist is more than one million dollars, and by the acts of defendant said complainant's business has been interfered with and damaged, and continues to be

interfered with and damaged, to the extent of more than three thousand dollars.

XIII.

That complainant has no adequate remedy at law.

Wherefore, complainant prays:

1. That process of subpoena issue herein, directed to the said Sun-Maid Raisin Growers of California directing it to appear and answer the allegations herein contained;

2. That an injunction issue herein, perpetually enjoining and restraining the said defendant, its agents and servants, and all claiming or holding through or under it, from using the said trade mark Sun-Maid otherwise than on packages containing raisins or on packages containing food products or confections made wholly or in part from raisins.

3. For such other and further relief in the premises as upon the facts as they may be made to appear may be just and reasonable.

4. For complainant's costs and disbursements of this suit and for such damages as complainant may show itself entitled to.

/s/ ARCHIBALD COX,

Pillsbury, Madison & Sutro, Solicitors and Counsel
for Complainant.

[Endorsed]: Filed October 16, 1929. [11]

MOVANT EXHIBIT No. 10

This Agreement, made and entered into this 10th day of March, 1917, by and between California Associated Raisin Company, a corporation, party of the first part, and Griffin & Skelley Company, a corporation, party of the second part, and California Fruit Cannery Association, a corporation, party of the third part,

Witnesseth:

Whereas, the party of the first part and the party of the third part, on or about the 10th day of September, 1913, entered into certain agreements and leases in writing, which, except as modified by subsequent correspondence between said parties, are still in force and effect, and are hereby referred to and made a part of this agreement, and which it is understood and agreed between the said parties shall so continue in force and effect until September 15th, 1918; and,

Whereas, the party of the first part and the party of the second part, on or about the 16th day of July, 1913, entered into certain agreements and leases, which, except as modified by subsequent correspondence and agreements between said parties, are still in force and effect, and are hereby referred to and made a part of this agreement, and which it is understood and agreed between the said parties shall so continue in force and effect until July 1st, 1918; and,

Whereas, since the execution of said contracts, the parties of the second and third parts together with the J. K. Armsby Company, a corporation, have transferred and conveyed to the California Packing Corporation certain of their properties, including their facilities for packing and marketing raisins, both said parties of the second and third parts and said J. K. Armsby Company, however, retaining their respective corporate identities; and [14]

Whereas, there is now pending in the United States District Court for the Southern District of New York a suit in equity entitled "The J. K. Armsby Company, Complainant, vs. Ernest L. Heebner and Archibald C. Clark, Defendants," involving the right of the party of the first part to use the trade-mark "Sun-Maid" in connection with the manufacture and sale of raisins, the J. K. Armsby Company claiming that such use by the party of the first part of said trade-mark is detrimental to the J. K. Armsby Company in the sale of raisins and other products, in that the name "Sun-Maid" was and is mistaken for and confused with the trade-mark "Sunkist" owned by The J. K. Armsby Company and used by it in connection with the sale of raisins, dried fruits and canned goods; and,

Whereas, said trade-mark "Sunkist," and all of the right of said The J. K. Armsby Company to use the same, and all of the interest of said The J. K. Armsby Company in and to the suit pending as aforesaid, have been transferred and assigned to said California Packing Corporation; and

Whereas, the party of the first part desires that its right to use the said trade-mark "Sun-Maid" in connection with the packing and sale of raisins and food products or confections containing raisins shall be established as against the J. K. Armsby Company, or its successors, or any one claiming through or under them, the right to use said trade-mark "Sunkist," and to that end to procure the dismissal of said suit; and,

Whereas, the parties of the second and third parts desire to procure the consent of the party of the first part to the employment by the parties of the second and third parts of said California Packing Corporation as their manufacturing and selling agents for the purpose of fully carrying out the [15] provisions of the contracts and leases hereinbefore referred to;

Now, Therefore, in consideration of the premises and of the procurement by the parties of the second and third parts of the dismissal of the said suit pending in the United States District Court, in and for the Southern District of New York entitled "The J. K. Armsby Company, Compainant, vs. Ernest L. Heebner and Archibald C. Clark, Defendants," and the procurement by said parties of the second and third parts of an agreement on the part of said California Packing Corporation and The J. K. Armsby Company, that no claim shall be made hereafter that the trade-mark of the party of the first part, "Sun-Maid," when used in connection with the packing and sale of raisins and food prod-

ucts or confections containing raisins interferes with the trade-mark "Sunkist" formerly owned by said The J. K. Armsby Company and now owned by said California Packing Corporation, the party of the first part has agreed, and does hereby agree, that the contracts and leases now in force and effect between it and the parties of the second and third parts respectively as above recited, shall continue in full force and effect until the respective dates of termination thereof above stated, notwithstanding the transfer by the parties of the second and third parts, or either of them, of their manufacturing and selling facilities to the said California Packing Corporation; and the party of the first part agrees that the parties of the second and third parts may employ the said California Packing Corporation as their agent for the purpose of packing and selling raisins, and otherwise carrying out the covenants of said contracts on their parts respectively to be performed.

And the party of the first part further agrees, in [16] consideration of the dismissal of said suit and the agreement to be procured from said The J. K. Armsby Company and California Packing Corporation as aforesaid, concerning the use of said trade-mark "Sun-Maid," that it the party of the first part will use the said trade-mark "Sun-Maid" only on packages containing raisins or on packages containing food products or confections made wholly or in part from raisins, and that said trade-mark when so used by the party of the first part

shall always be accompanied by the name of the party of the first part, or the name "Associated Warehouse Company" as packer; provided however, that nothing herein contained shall be construed to limit the right of the party of the first part to sell or assign said trade-mark or to license other persons, firms, or corporations to use the same to the extent to which the party of the first part has the right to use the same under this agreement as against said The J. K. Armsby Company or said California Packing Corporation; and provided further, that nothing herein contained shall be construed to require said The J. K. Armsby Company or California Packing Corporation to relinquish its use of the trade-mark "Sunkist" in connection with the packing and sale of raisins or other food products.

It is expressly understood and agreed that this agreement shall be of no force or effect until the parties of the second and third parts shall have procured and delivered to the party of the first part a copy of the order of court dismissing the action above referred to, duly certified by the clerk of the United States District Court, for the Southern District of New York, and shall also have procured from said The J. K. Armsby Company and California Packing Corporation the agreement concerning the use of said trade-mark "Sun-Maid" [17] above provided for; it being understood, however, that the approval of this agreement by said last-named corporations endorsed thereon shall be

deemed to be a sufficient agreement on their part concerning the use of said trade-mark.

In Witness Whereof, the parties hereto, by their duly authorized officers, have executed this agreement and affixed hereto their respective corporate seals, the day and year first above written.

CALIFORNIA ASSOCIATED
RAISIN COMPANY,

By /s/ JAMES MADISON,
V-President,

By /s/ C. A. MURDOCH,
Secretary.

GRIFFIN & SKELLEY
COMPANY,

By /s/ C. W. GRIFFIN.

CALIFORNIA FRUIT CAN-
NERS ASSOCIATION,

By /s/ S. L. GOLDSTEIN,
V-President,

By /s/ CHAS. B. CARR,
Secretary.

For and in consideration of the execution of the foregoing agreement by California Associated Raisin Company, the undersigned California Packing Corporation and The J. K. Armsby Company do hereby approve and adopt the same as their agreement in so far as the same relates to the use

by said California Associated Raisin Company of the trade-mark "Sun-Maid."

Dated: This 10th day of March, 1917.

CALIFORNIA PACKING
CORPORATION,

By /s/ J. K. ARMSBY,
President.

THE J. K. ARMSBY
COMPANY,

By /s/ J. G. NEWTON,
V-President.

Received in evidence June 19, 1958. [18]

[Title of District Court and Cause.]

ANSWER

Now comes Sun-Maid Raisin Growers of California, defendant above named, and in answer to the bill of complaint herein, admits, denies and alleges as follows:

1.

Answering Paragraph I of said bill of complaint, defendant alleges that it is without knowledge as to the allegations contained in said paragraph, and therefore denies the same.

2.

Answering Paragraph II of said bill of complaint, defendant admits the allegations thereof.

3.

Answering Paragraph III of said bill of complaint, defendant admits that this is a suit of a civil nature in equity but denies that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00) and has no knowledge as to whether or not it is between citizens of different states. [19]

4.

Answering Paragraph IV of said bill of complaint, defendant alleges that it is without knowledge as to the allegations contained in said paragraph, and therefore denies the same.

5.

Answering Paragraph V of said bill of complaint, defendant alleges that it is without knowledge as to the allegations contained in said paragraph, and therefore denies the same.

6.

Answering Paragraph VI of said bill of complaint, defendant alleges that it is without knowledge as to the allegations contained in said paragraph.

7.

Answering Paragraph VII of said bill of complaint, defendant admits that a trade-mark "Sun-Kist has been registered in the United States Patent Office but is without knowledge as to whether complainant is now the proprietor of the said certifi-

cates of trade-mark registrations covering said trade-mark "Sun-Kist" set forth in the bill of complaint herein and requires [20] complainant to produce each and all of said certificates, together with evidence that complainant is the proprietor thereof.

8.

Answering Paragraph VIII of said bill of complaint, defendant alleges that it is without knowledge as to the allegations contained in said paragraph, and therefore denies the same.

9.

Answering Paragraph IX of said bill of complaint, defendant admits that heretofore, to wit, on or about the day of January, 1915, the California Associated Raisin Company, a corporation, then engaged in business in the State of California and elsewhere, commenced to use the trade-mark "Sun-Maid" in connection with raisins and that said J. K. Armsby Company, said predecessor of complainant thereupon and on or about the day of June, 1915, brought suit in the United States District Court, in and for the Southern District of New York, against two individuals residing in the said district of New York, who were at that time using said trade-mark "Sun-Maid" in said district in connection with the sale of raisins which had been produced by said California Associated Raisin Company and sold to said individuals by said California Associated Raisin Company; admits that in said suit said, The J. K. Armsby Company, claimed

that said use was an infringement upon the rights of said, the J. K. Armsby Company, in, to or in connection with said trade-mark "Sun-Kist" alleged to have belonged to said, The J. K. Armsby Company, and that company in said suit prayed for an injunction against the said defendants using said trade-mark "Sun-Maid." [21]

Defendant is without knowledge as to whether, on the 8th day of November, 1916, or any other date or at all, said The J. K. Armsby Company assigned and transferred to complainant, all of its rights to use the said trade-mark "Sun-Kist" and all of its interest in and to said suit.

Denies on information and belief that thereafter or on or about the 10th day of March, 1917, or while said suit was pending in said court, or at any other time, or at all, the said California Associated Raisin Company desired that its right to use the said trade-mark "Sun-Maid" in connection with packages containing raisins or on packages containing food products or confections made wholly or in part from raisins, should be established as against said, The J. K. Armsby Company, or complainant, or to that end, or at all, that said California Associated Raisin Company desired to procure a dismissal of said suit or that it entered into a written agreement on said last-named date or at any other time, or at all, with complainant and said, The J. K. Armsby Company, and others, wherein or whereby it was covenanted or agreed by all or any of said parties to said alleged agreement that said suit should be dismissed

or that no claim should ever be made thereafter by the said, The J. K. Armsby Company, or by complainant, to the effect that the said trade-mark "Sun-Maid" when used in connection with the packing or sale of raisins or other food products or confections containing raisins, interfered with the trade-mark "Sun-Kist" alleged to be formerly owned and used by the said, The J. K. Armsby Company, or then, at the time said alleged agreement was so entered into owned or used by complainant; denies on information and belief that in consideration thereof, or for any other reason, or at all, the said California Associated Raisin Company on its part covenanted or agreed in or by said agreement that it would use the said trade-mark "Sun-Maid" "only on packages containing raisins or on [22] packages containing food products or confections made wholly or in part from raisins" or that if it, the said California Associated Raisin Company should sell or assign said trade-mark "Sun-Maid" the buyer or assignee should only have the right to use the said trade-mark "to the extent" that said California Associated Raisin Company had "the right to use the same" under said alleged agreement. Denies on information and belief that it was furthermore, or at all, provided in said alleged agreement that nothing therein contained should be construed to require the said, The J. K. Armsby Company, or complainant, to relinquish its right to the use of the said trade-mark "Sun-Kist" in connection with the packing or sale of raisins or other food products.

Admits that complainant the said, The J. K. Armsby Company, caused said suit to be dismissed on or about the 18th day of April, 1917, but is without knowledge as to whether such dismissal was in accordance with said alleged agreement and denies on information and belief that said alleged contract has ever since been and is now or ever was in full or any other force or effect, or that complainant, or said, The J. K. Armsby Company, have ever duly or otherwise, or at all, performed all or any of the conditions of said alleged contract on their part, or on the part of either of them, to be performed.

10.

Answering Paragraph X of said bill of complaint, defendant denies on information and belief as aforesaid, that said contract was ever made, but admits that said California Associated Raisin Company continued to carry on its said business under its said name until the 17th day of February, 1922, on which day it changed its name to Sun-Maid Raisin Growers, and admits that thereafter said corporation, under the name of Sun-Maid Raisin Growers, continued to carry on said business until [23] on or about the 8th day of November, 1923, and thereafter; admits that on or about the 8th day of November, 1923, said Sun-Maid Raisin Growers assigned and transferred unto Sun-Maid Raisin Growers of California, defendant herein, its right, title and interest, in and to said trade-mark "Sun-Maid" together with the business and goodwill thereof of said Sun-Maid Raisin Growers, in con-

nection with which business and goodwill said trade-mark was then being or had been used, but denies on information and belief that said Sun-Maid Raisin Growers thereupon went out of business or has ever since continued to do no business, and in that respect defendant alleges on information and belief that said Sun-Maid Raisin Growers is still an existing corporation. Admits that the defendant has ever since carried on and does now carry on a portion of the business formerly carried on by said Sun-Maid Raisin Growers. Admits that said Sun-Maid Raisin Growers of California, the defendant herein, by virtue of said assignment and transfer from said Sun-Maid Raisin Growers acquired and has ever since owned and now owns said trade-mark "Sun-Maid," but denies that the use thereof was in any way agreed upon or limited in and by said alleged agreement of March 10, 1917, or by any other agreement, or at all, and denies that said California Associated Raisin Company or said Sun-Maid Raisin Growers of California has never acquired or never owned greater rights to the use of said trade-mark "Sun-Maid," than alleged to have been agreed upon or limited by said alleged agreement as aforesaid.

Admits that thereafter, to wit, on or about the first day of January, 1929, the defendant was using the trade-mark "Sun-Maid" upon canned goods, canned fruits, canned vegetables, catsup, jam, jelly, canned soup, and upon many other food products, all of which are articles of foods and ingredients of

foods, but [24] denies that it began using such trade-mark, on said products on said last named date and alleges that it so began, long prior to January 1, 1929; denies that such use is in violation of any of complainant's alleged rights, or that all of said goods are essentially or otherwise of the same class or particular description as the goods alleged to be selected, prepared or marketed by said, The J. K. Armsby Company or by complainant under the trade-mark "Sun-Kist" at the time said alleged agreement of March 10, 1917, was alleged to have been entered into, or for a long time prior thereto or ever since. Admits that said defendant has sold or caused to be sold and is now selling or causing to be sold, said goods throughout the United States and elsewhere, under the trade-mark "Sun-Maid."

Admits that on or about the 4th day of March, 1929, complainant notified the defendant that its said use of the trade-mark "Sun-Maid," in connection with said canned goods, canned fruits or food products, other than raisins or confections made wholly or in part of raisins, was contrary to defendant's rights and obligations and in violation of complainant's rights under said alleged agreement of March 10, 1917, and that complainant demanded that defendant desist from continuing said use, but alleges that this notice was the first time defendant had ever heard of the alleged contract respecting said "Sun-Maid" trade-mark made or entered into on or about March 10, 1917. Admits that thereafter

and on or about the 15th day of March, 1929, the defendant notified complainant that said agreement was not binding upon it, but was binding only, if at all, upon said California Associated Raisin Company, and admits that defendant refused to desist or discontinue what is alleged to be violations of said alleged contract, and admits that defendant asserts the right to continue the same, and defendant has ever since continued to and does now use said [25] trade-mark "Sun-Maid" upon canned goods, canned fruits, canned vegetables, catsup, jam, jelly, canned soup and many other food products or confections not made wholly or in part from raisins but denies that such continued use will be or ever has been to the great or irreparable or any other damage or injury of complainant.

11.

Answering Paragraph XI of said bill of complaint, defendant denies that the word or words "Sun-Kist" and "Sun-Maid" closely resemble each other in sound or suggestiveness in connection with foods or food products, and denies that the name "Sun-Maid" is frequently, or at all, mistaken for or confused with the name or trade-mark "Sun-Kist" alleged to be owned by complainant and alleged to be used in connection with the sale of complainant's goods. Denies that the use of said trade-mark "Sun-Maid" would or does deceive the public or cause purchasers to buy the goods of defendant in belief that the said goods are the alleged "Sun-Kist" goods of complainant, alleged to have

been long-known and in demand, and as and for the goods of complainant, and denies that the use thereof has promoted or will promote mistake, confusion or fraudulent substitution or the division, diversion or destruction of complainant's alleged goodwill or business or will jeopardize the alleged goodwill or reputation which complainant is alleged to have built up through many years of effort or large expenditures of money. [26]

12.

Answering Paragraph XII of said bill of complaint, defendant denies on information and belief that the value of said alleged goodwill of complainant's business of preparing or marketing its food products under its said alleged trade-mark "Sun-Kist" is more than one million dollars, or of any value whatsoever, or that by the acts of defendant said complainant's business has been interfered with or damaged or continues to be or ever was interfered with or damaged to the extent of more than three thousand dollars or to any other sum or at all.

13.

For a further and separate defense, defendant alleges that neither complainant nor The J. K. Armsby Company is the exclusive owner of the word "Sun" for trade-mark use and that such word has been commonly and extensively used by others as a trade-mark applied to foods and ingredients of foods, either alone or part of a composite mark, long prior to the alleged adoption and first use of

the word "Sun-Kist" by said The J. K. Armsby Company, as appears from the following trademark registrations in the United States Patent Office:

No. 9420, May 30, 1882, H. Denny & Sons;

No. 12474, August 4, 1885, P. D. Gwaltney & Company;

No. 33267, July 25, 1899, Wisconsin Condensed Milk Company;

No. 35435, November 13, 1900, The American Cotton Oil Company;

No. 39181, November 4, 1902, Alaska Packers Association;

No. 45259, August 8, 1905, The Gwaltney-Bunkley Peanut Company;

No. 53653, June 5, 1906, Philip Wunderle;

No. 60249, February 5, 1907, The Albert Dickinson Company;

No. 61039, March 5, 1907, The American Cotton Oil Company;

No. 61796, April 2, 1907, Wisconsin Condensed Milk Company;

No. 43082, August 2, 1904, Hubbard Milling Company;

No. 60229, February 5, 1907, Ross W. Weir & Company;

No. 8459, July 12, 1881, Farmers Fruit Preserving Company;

No. 14845, October 18, 1887, P. Wunderle;

No. 14995, December 6, 1887, Bennett Day & Company;

No. 26755, July 2, 1895, David Stewart; [27]

No. 44002, January 17, 1905, Dwight M. Baldwin, Jr.;

No. 12612, September 29, 1885, H. H. Warner;

No. 18164, July 8, 1890, W. B. Timms;

No. 20075, August 25, 1891, John L. Rodgers & Company;

No. 15458, May 13, 1888, Cobb, Wight & Company;

No. 41407, November 3, 1903, The Robert F. Mackenzie Company;

No. 48516, January 2, 1906, The Robert F. Mackenzie Company;

No. 60292, February 5, 1907, National Candy Company;

No. 43881, December 20, 1904, Sunbrights California Food Company;

No. 46863, October 10, 1905, Sunbrights California Food Company;

No. 49685, February 13, 1906, Sunbrights California Food Company;

No. 40935, August 18, 1903, Harvey Lockie & Company;

No. 60119, January 29, 1907, Ross W. Weir & Company;

No. 9433, June 6, 1882, H. Denny & Sons;

No. 27280, November 19, 1895, Curtis P. Upshur;

No. 31494, April 26, 1898, Sarah A. Yost;

No. 37936, March 11, 1902, The Dolan Mercantile Company;

No. 40104, April 14, 1903, The Queen City Creamery Company;

No. 41713, December 22, 1903, The Dolan Mercantile Company;

No. 49929, February 20, 1906, Yost Yeast Company;

No. 52515, May 8, 1906, The Dolan Mercantile Company;

No. 60651, February 19, 1907, The Dolan Mercantile Company;

No. 64135, July 23, 1907, The Dolan Mercantile Company;

No. 65375, September 24, 1907, August L. Jaenicke;

No. 41115, September 15, 1903, The Sunland Orchard Company;

No. 26096, February 19, 1895, National Milling Company;

No. 27956, March 17, 1896, The Waterloo Yeast Company;

No. 50369, March 13, 1906, George Frank;

No. 54427, June 26, 1906, George Frank;

No. 56340, September 11, 1906, Sunlight Hominy Company;

No. 44025, January 24, 1905, The Force Food Company;

No. 55816, August 21, 1906, The Force Food Company;

No. 31049, December 28, 1897, New York Condensed Milk Company;

No. 39035, October 14, 1902, The T. A. Snider Preserve Company;

No. 49670, February 13, 1906, Portland Packing Company;

No. 19625, June 2, 1891, Portland Packing Company;

No. 21387, June 28, 1892, L. J. Rose & Company, Ltd.;

No. 31830, August 2, 1898, Byrd G. Pollard;

No. 32420, January 24, 1899, Swift & Company;

No. 52761, May 15, 1906, Russell & Company;

No. 54584, June 26, 1906, Albert Edward Tate;

No. 42591, May 10, 1904, Kentucky Refining Company;

No. 57687, November 27, 1906, A. H. Herrick & Son;

No. 66384, November 26, 1907, Bosman & Lohman Company;

No. 17930, May 20, 1890, Joseph Tetley & Co.;

No. 58,636, December 18, 1906, Consumers' Coffee Co. of No. O. Ltd.;

No. 80,208, November 22, 1910, Norval Landon Burchell;

No. 82823, July 25, 1911, Woolson Spice Company;

No. 91450, May 6, 1913, Austin, Nichols & Co.;

No. 93576, September 23, 1913, The Woolson Spice Co.;

No. 102051, January 26, 1915, Cheek-Neal Coffee Co.;

No. 110108, May 2, 1916, Joseph Tetley & Co., Inc.;

No. 118395, September 4, 1917, Edmands Coffee Company;

No. 123327, October 29, 1918, The Brundage Brothers Company. [28]

14.

For a further and separate defense, defendant alleges that neither complainant nor The J. K. Armsby Company is the exclusive owner of the word "Sun-Kist" for trade-mark use and that such word has been commonly and extensively used by others as a trade-mark applied to foods and ingredients of foods, either alone or as part of a composite mark, as appears from the following trade-mark registrations in the United States Patent Office:

No. 72087 (Renewed), January 5, 1909, California Fruit Growers Exchange, Los Angeles, California, for oranges;

No. 85069, January 30, 1912, California Fruit Growers Exchange, Los Angeles, California; lemons;

No. 117107, June 19, 1917, California Fruit Growers Exchange, Los Angeles, California, for citrus fruits;

No. 92809, July 29, 1913, Maney Milling Company, wheat flour;

No. 102222, January 26, 1915, Ward Baking Company, cakes;

No. 111055, June 20, 1916, Redbanks Orchard Company, table grapes;

No. 176568, November 27, 1923, Sunkist Lemon Pie Company, lemon meringue pies.

15.

For a further and separate defense, defendant alleges that there is no deceptive similarity nor possibility of public confusion between "Sun-Maid"

and "Sun-Kist" as trade-marks applied to foods and ingredients of foods, and that the United States Patent Office, notwithstanding previous trade-mark registrations of "Sun-Kist" as applied to foods and ingredients of foods has consistently and repeatedly allowed and registered the trade-mark "Sun-Maid" to defendant as applied to foods and ingredients of foods. [29]

16.

For a further and separate defense, defendant alleges that there is no deceptive similarity nor possibility of public confusion between "Sun-Maid" and "Sun-Kist," as trade-marks applied to foods and ingredients of foods, and that such lack of deceptive similarity and public confusion was admitted by complainant and said The J. K. Armsby Company in said alleged agreement dated March 10, 1917, if in fact such agreement was ever made as stated in the bill of complaint herein, defendant alleging on information and belief that such agreement provides that said California Associated Raisin Company and said The J. K. Armsby Company may continue to use respectively the trade-marks "Sun-Maid" and "Sun-Kist" as applied to raisins.

17.

For a further and separate defense, defendant alleges that there is no deceptive similarity nor possibility of public confusion between "Sun-Maid" and "Sun-Kist" as trade-marks applied to foods and ingredients of foods, and that such lack of deceptive similarity and public confusion was admitted by complainant and said The J. K. Armsby

Company, and settled by decree of court, when the suit brought in the United States District Court for the Southern District of New York, and more specifically referred to in Paragraph IX of the bill of complaint herein, was dismissed by complainant therein on or about April 18, 1917.

18.

For a further and separate defense, defendant alleges on information and belief, that since March 10, 1917, the date of said alleged agreement, California Associated Raisin Company (later changed to Sun-Maid Raisin Growers) and Sun-Maid Raisin Growers of California, defendant herein, on one hand, and [30] The J. K. Armsby Company and California Packing Corporation, complainant herein, on the other hand, have continuously, extensively, and competitively used the trade-marks "Sun-Maid" and "Sun-Kist" respectively, as applied to raisins and said Sun-Maid Raisin Growers of California and said California Packing Corporation are now so using the respective trade-marks "Sun-Maid" and "Sun-Kist" as applied to the same product, namely raisins, without any confusion resulting.

19.

For a further and separate defense, defendant alleges that its right to use the trade-mark "Sun-Maid," as applied to canned goods, canned fruits, canned vegetables, catsup, jam, jelly, canned soup, and upon certain other food products, was not acquired by assignment or otherwise from said California Associated Raisin Company, but by reason

of defendant's own adoption and first use thereof on said products.

20.

For a further and separate defense, defendant alleges that its right to use the trade-mark "Sun-Maid" as applied to rice, extracts, fish, cereals, tea, coffee, spices, and certain other food products, was not acquired by assignment or otherwise from California Associated Raisin Company, but by reason of adoption and first use thereof by San Joaquin Grocery Co. and its predecessors, of Fresno, California, on or about January 16, 1916, which trade-mark as applied to said products and goodwill connected therewith was assigned to defendant herein on or about August 11, 1924. [31]

21.

For a further and separate defense, defendant alleges on information and belief that said alleged agreement dated March 10, 1917, if in fact such agreement was ever made as stated in the bill of complaint herein, is void and not binding on defendant herein by reason of constituting undue restraint of trade and as being against public policy.

22.

For a further and separate defense, defendant alleges on information and belief that the said alleged agreement dated March 10, 1917, if in fact such agreement was ever made as stated in the bill of complaint herein, is binding, if at all, only upon the parties thereto and any person, firm, or corporation, to which said California Associated Raisin Company might thereafter issue a license

to use said trade-mark "Sun-Maid," but that it is specifically provided in said alleged agreement that nothing therein contained should be construed to limit the right of said California Associated Raisin Company to sell or assign said trade-mark.

23.

For a further and separate defense, defendant alleges that complainant herein is estopped, because of laches and unreasonable delay in bringing this suit, by reason of the following facts, to wit:

The trade-mark "Sun-Maid" was adopted and first used by San Joaquin Grocery Co., and its predecessors, as applied to food flavoring extracts, canned fish, nuts in their natural state, table syrup, mincemeat, cornstarch, canned meats, canned corned [32] beef, rice, pickles, sauces for food flavoring purposes, vinegar, edible oil, molasses, breakfast cereals, teas, coffees, and spices, as early as January 16, 1916; thereafter and on or about June 20, 1923, said San Joaquin Grocery Co. filed an application in the United States Patent Office, for registration of said trade-mark "Sun-Maid," applied to said products above named; thereafter such application for registration was allowed by the United States Patent Office and said trade-mark "Sun-Maid" was published on June 3, 1924, in the Official Gazette of the Patent Office, Vol. 323, page 13; thereafter and on or about August 11, 1924, said San Joaquin Grocery Co. assigned and transferred said trade-mark "Sun-Maid" used as aforesaid, together with the goodwill in connection therewith, to Sun-Maid Raisin Growers of California, defend-

ant herein, and said trade-mark was duly registered in the name of defendant on or about January 6, 1925, as No. 193,753; thereafter and on or about February 13, 1926, said Sun-Maid Raisin Growers of California adopted and first used the trade-mark "Sun-Maid" as applied to baking powder and on or about December 22, 1926, filed an application in the United States Patent Office, for registration of said trade-mark as applied to baking powder; thereafter such application for registration was allowed by the United States Patent Office and said trade-mark "Sun-Maid" was published on February 8, 1927, in the Official Gazette of the Patent Office, Vol. 355, page 221, and duly registered by defendant on or about April 19, 1927, as No. 226,774.

The use of said trade-mark "Sun-Maid" on all of the aforesaid products, and on many other food products, has been continuously, and publicly carried on by San Joaquin Grocery Co., and by Sun-Maid Raisin Growers of California, in the regular course of trade, since the adoption and first use thereof by the respective companies as aforesaid, and said trade-mark "Sun-Maid" is now so being used by Sun-Maid [33] Raisin Growers of California, representing a valuable goodwill and trade-mark right.

Defendant alleges on information and belief that complainant herein has subscribed to said Official Gazette for more than six years last past, and through its officers and employees saw and knew of said trade-mark publications and registrations of the trade-mark "Sun-Maid" applied to food prod-

ucts other than raisins and that said complainant as early as January 16, 1916, and continuously thereafter, through its officers and employees, saw and knew that said trade-mark "Sun-Maid" was being publicly used, first by San Joaquin Grocery Co., and later by defendant herein, in the regular course of trade, on the products above specifically named and on many other food products, but notwithstanding said knowledge, said complainant made no protest or complaint of any kind or character to defendant herein, until on or about the 4th day of March, 1929, when defendant was notified as alleged in Paragraph X of the bill of complaint herein.

Wherefore defendant prays that said bill of complaint be dismissed with costs to defendant.

Dated November 16, 1929.

SUN-MAID RAISIN
GROWERS OF CALIFORNIA,

By /s/ MILLER & BOYKEN,
Its Solicitors.

/s/ JOHN H. MILLER,

/s/ A. W. BOYKEN,

/s/ E. S. ROGERS,

/s/ ALLEN M. REED,

Of Counsel.

Receipt of copy acknowledged.

[Endorsed]: Filed November 14, 1929. [34]

[Title of District Court and Cause.]

AMENDED ANSWER

Now comes Sun-Maid Raisin Growers of California, defendant above named, and in answer to the bill of complaint herein, admits, denies and alleges as follows:

1.

Answering Paragraph I of said bill of complaint, defendant alleges that it is without knowledge as to the allegations contained in said paragraph, and therefore denies the same.

2.

Answering Paragraph II of said bill of complaint, defendant admits the allegations thereof.

3.

Answering Paragraph III of said bill of complaint, defendant admits that this is a suit of a civil nature in equity but denies that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00) and has no knowledge as to whether or not it is between citizens of different states. [36]

4.

Answering Paragraph IV of said bill of complaint, defendant alleges that it is without knowledge as to the allegations contained in said paragraph, and therefore denies the same.

5.

Answering Paragraph V of said bill of complaint, defendant alleges that it is without knowledge as to the allegations contained in said paragraph, and therefore denies the same.

6.

Answering Paragraph VI of said bill of complaint, defendant alleges that it is without knowledge as to the allegations contained in said paragraph.

7.

Answering Paragraph VII of said bill of complaint, defendant admits that a trade-mark "Sun-Kist" has been registered in the United States Patent Office but is without knowledge as to whether complainant is now the proprietor of the said certificates of trade-mark registrations covering said trade-mark "Sun-Kist" set forth in the bill of complaint herein and requires [37] complainant to produce each and all of said certificates, together with evidence that complainant is the proprietor thereof.

8.

Answering Paragraph VIII of said bill of complaint, defendant alleges that it is without knowledge as to the allegations contained in said paragraph, and therefore denies the same.

9.

Answering Paragraph IX of said bill of complaint, defendant admits that heretofore, to wit, on

or about the day of January, 1915, the California Associated Raisin Company, a corporation, then engaged in business in the State of California and elsewhere, commenced to use the trade-mark "Sun-Maid" in connection with raisins and that said The J. K. Armsby Company, said predecessor of complainant thereupon and on or about the day of June, 1915, brought suit in the United States District Court, in and for the Southern District of New York, against two individuals residing in the said district of New York, who were at that time using said trade-mark "Sun-Maid" in said district in connection with the sale of raisins which had been produced by said California Associated Raisin Company and sold to said individuals by said California Associated Raisin Company; admits that in said suit said, The J. K. Armsby Company, claimed that said use was an infringement upon the rights of said, The J. K. Armsby Company, in, to or in connection with said trade-mark "Sun-Kist" alleged to have belonged to said, The J. K. Armsby Company, and that company in said suit prayed for an injunction against the said defendants using said trade-mark "Sun-Maid." [38]

Defendant is without knowledge as to whether, on the 8th day of November, 1916, or any other date or at all, said The J. K. Armsby Company assigned and transferred to complainant, all of its rights to use the said trade-mark "Sun-Kist" and all of its interest in and to said suit.

Denies on information and belief that thereafter or on or about the 10th day of March 1917, or while said suit was pending in said court, or at any other time, or at all, the said California Associated Raisin Company desired that its right to use the said trade-mark "Sun-Maid" in connection with packages containing raisins or on packages containing food products or confections made wholly or in part from raisins, should be established as against said, The J. K. Armsby Company, or complainant, or to that end, or at all, that said California Associated Raisin Company desired to procure a dismissal of said suit or that it entered into a written agreement on said last-named date or at any other time, or at all, with complainant and said, The J. K. Armsby Company, and others, wherein or whereby it was covenanted or agreed by all or any of said parties to said alleged agreement that said suit should be dismissed or that no claim should ever be made thereafter by the said, The J. K. Armsby Company, or by complainant, to the effect that the said trade-mark "Sun-Maid" when used in connection with the packing or sale of raisins or other food products or confections containing raisins, interfered with the trade-mark "Sun-Kist" alleged to be formerly owned and used by the said, The J. K. Armsby Company, or then, at the time said alleged agreement was so entered into owned or used by complainant; denies on information and belief that in consideration thereof, or for any other reason, or at all, the said California Associated Raisin Company on its part covenanted or agreed in or by said agreement

that it would use the said trade-mark "Sun-Maid" "only on packages containing raisins or on [39] packages containing food products or confections made wholly or in part from raisins" or that if it, the said California Associated Raisin Company should sell or assign said trade-mark "Sun-Maid" the buyer or assignee should only have the right to use the said trade-mark "to the extent" that said California Associated Raisin Company had "the right to use the same" under said alleged agreement. Denies on information and belief that it was furthermore, or at all, provided in said alleged agreement that nothing therein contained should be construed to require the said, The J. K. Armsby Company, or complainant, to relinquish its right to the use of the said trade-mark "Sun-Kist" in connection with the packing or sale of raisins or other food products.

Admits that complainant the said, The J. K. Armsby Company, caused said suit to be dismissed on or about the 18th day of April, 1917, but is without knowledge as to whether such dismissal was in accordance with said alleged agreement and denies on information and belief that said alleged contract has ever since been and is now or ever was in full or any other force or effect, or that complainant, or said, The J. K. Armsby Company, have ever duly or otherwise, or at all, performed all or any of the conditions of said alleged contract on their part, or on the part of either of them, to be performed.

10.

Answering Paragraph X of said bill of complaint, defendant denies on information and belief as aforesaid, that said contract was ever made, but admits that said California Associated Raisin Company continued to carry on its said business under its said name until the 17th day of February, 1922, on which day it changed its name to Sun-Maid Raisin Growers, and admits that thereafter said corporation, under the name of Sun-Maid Raisin Growers, continued to carry on said business until [40] on or about the 8th day of November, 1923, and thereafter; admits that on or about the 8th day of November, 1923, said Sun-Maid Raisin Growers assigned and transferred unto Sun-Maid Raisin Growers of California, defendant herein, its right, title and interest, in and to said trade-mark "Sun-Maid" together with the business and goodwill thereof of said Sun-Maid Raisin Growers, in connection with which business and goodwill said trade-mark was then being or had been used, but denies on information and belief that said Sun-Maid Raisin Growers thereupon went out of business or has ever since continued to do no business, and in that respect defendant alleges on information and belief that said Sun-Maid Raisin Growers is still an existing corporation. Admits that the defendant has ever since carried on and does now carry on a portion of the business formerly carried on by said Sun-Maid Raisin Growers. Admits that said Sun-Maid Raisin Growers of California, the defendant herein, by virtue of said assignment and transfer from

said Sun-Maid Raisin Growers acquired and has ever since owned and now owns said trade-mark "Sun-Maid," but denies that the use thereof was in any way agreed upon or limited in and by said alleged agreement of March 10, 1917, or by any other agreement, or at all, and denies that said California Associated Raisin Company or said Sun-Maid Raisin Growers of California has never acquired or never owned greater rights to the use of said trade-mark "Sun-Maid," than alleged to have been agreed upon or limited by said alleged agreement as aforesaid.

Admits that thereafter, to wit, on or about the first day of January, 1929, the defendant was using the trade-mark "Sun-Maid" upon canned goods, canned fruits, canned vegetables, catsup, jam, jelly, canned soup, and upon many other food products, all of which are articles of foods and ingredients of foods, but [41] denies that it began using such trade-mark, on said products on said last-named date and alleges that it so began, long prior to January 1, 1929; denies that such use is in violation of any of complainant's alleged rights, or that all of said goods are essentially or otherwise of the same class or particular description as to the goods alleged to be selected, prepared or marketed by said, The J. K. Armsby Company or by complainant under the trade-mark "Sun-Kist" at the time said alleged agreement of March 10, 1917, was alleged to have been entered into, or for a long time prior thereto or ever since. Admits that said defendant

has sold or caused to be sold and is now selling or causing to be sold, said goods throughout the United States and elsewhere, under the trade-mark "Sun-Maid."

Admits that on or about the 4th day of March, 1929, complainant notified the defendant that its said use of the trade-mark "Sun-Maid," in connection with said canned goods, canned fruits or food products, other than raisins or confections made wholly or in part of raisins, was contrary to defendant's rights and obligations and in violation of complainant's rights under said alleged agreement of March 10, 1917, and that complainant demanded that defendant desist from continuing said use, but alleges that this notice was the first time defendant had ever heard of the alleged contract respecting said "Sun-Maid" trade-mark made or entered into on or about March 10, 1917. Admits that thereafter and on or about the 15th day of March, 1929, the defendant notified complainant that said agreement was not binding upon it, but was binding only, if at all, upon said California Associated Raisin Company, and admits that defendant refused to desist or discontinue what is alleged to be violations of said alleged contract, and admits that defendant asserts the right to continue the same, and defendant has ever since continued to and does now use said [42] trade-mark "Sun-Maid" upon canned goods, canned fruits, canned vegetables, catsup, jam, jelly, canned soup and many other food products or confections not made wholly or in part from raisins

but denies that such continued use will be or ever has been to the great or irreparable or any other damage or injury of complainant.

11.

Answering Paragraph XI of said bill of complaint, defendant denies that the word or words "Sun-Kist" and "Sun-Maid" closely resemble each other in sound or suggestiveness in connection with foods or food products, and denies that the name "Sun-Maid" is frequently, or at all, mistaken for or confused with the name or trade-mark "Sun-Kist" alleged to be owned by complainant and alleged to be used in connection with the sale of complainant's goods. Denies that the use of said trade-mark "Sun-Maid" would or does deceive the public or cause purchasers to buy the goods of defendant in belief that the said goods are the alleged "Sun-Kist" goods of complainant, alleged to have been long-known and in demand, and as and for the goods of complainant, and denies that the use thereof has promoted or will promote mistake, confusion or fraudulent substitution or the division, diversion or destruction of complainant's alleged goodwill or business or will jeopardize the alleged goodwill or reputation which complainant is alleged to have built up through many years of effort or large expenditures of money. [43]

12.

Answering Paragraph XII of said bill of complaint, defendant denies on information and belief

that the value of said alleged goodwill of complainant's business of preparing or marketing its food products under its said alleged trade-mark "Sun-Kist" is more than one million dollars, or of any value whatsoever, or that by the acts of defendant said complainant's business has been interfered with or damaged or continues to be or ever was interfered with or damaged to the extent of more than three thousand dollars or to any other sum or at all.

13.

For a further and separate defense, defendant alleges that neither complainant nor the J. K. Armsby Company is the exclusive owner of the word "Sun" for trade-mark use and that such word has been commonly and extensively used by others as a trade-mark applied to foods and ingredients of foods, either alone or part of a composite mark, long prior to the alleged adoption and first use of the word "Sun-Kist" by said The J. K. Armsby Company, as appears from the following trade-mark registrations in the United States Patent Office:

No. 9420, May 30, 1882, H. Denny & Sons;

No. 12474, August 4, 1885, P. D. Gwaltney & Company;

No. 33267, July 25, 1899, Wisconsin Condensed Milk Company;

No. 35435, November 13, 1900, The American Cotton Oil Company;

No. 39181, November 4, 1902, Alsaska Packers Association;

No. 45259, August 8, 1905, The Gwaltney-Bunkley Peanut Company;

No. 53653, June 5, 1906, Philip Wunderle;

No. 60249, February 5, 1907, The Albert Dickinson Company;

No. 61039, March 5, 1907, The American Cotton Oil Company;

No. 61796, April 2, 1907, Wisconsin Condensed Milk Company;

No. 43082, August 2, 1904, Hubbard Milling Company;

No. 60229, February 5, 1907, Ross W. Weir & Company;

No. 8459, July 12, 1881, Farmers Fruit Preserving Company;

No. 14845, October 18, 1887, P. Wunderle;

No. 14995, December 6, 1887, Bennet Day & Company;

No. 26755, July 2, 1895, David Stewart; [44]

No. 44002, January 17, 1905, Dwight M. Baldwin, Jr.;

No. 12612, September 29, 1885, H. H. Warner;

No. 18164, July 8, 1890, W. B. Timms;

No. 20075, August 25, 1891, John L. Rodgers & Company;

No. 15458, May 13, 1888, Cobb, Wight & Company;

No. 41407, November 3, 1903, The Robert F. Mackenzie Company;

No. 48516, January 2, 1906, The Robert F. Mackenzie Company;

No. 60292, February 5, 1907, National Candy Company;

No. 43881, December 20, 1904, Sunbrights California Food Company;

No. 46863, October 10, 1905, Sunbrights California Food Company;

No. 49685, February 13, 1906, Sunbrights California Food Company;

No. 40935, August 18, 1903, Harvey Lockie & Company;

No. 60119, January 29, 1907, Ross W. Weir & Company;

No. 9433, June 6, 1882, H. Denny & Sons;

No. 27280, November 10, 1895, Curtis P. Upshur;

No. 31494, April 26, 1898, Sarah A. Yost;

No. 37936, March 11, 1902, The Dolan Mercantile Company;

No. 40104, April 14, 1903, The Queen City Creamery Company;

No. 41713, December 22, 1903, The Dolan Mercantile Company;

No. 49929, February 20, 1906, Yost Yeast Company;

No. 52515, May 8, 1906, The Dolan Mercantile Company;

No. 60651, February 19, 1907, The Dolan Mercantile Company;

No. 64135, July 23, 1907, The Dolan Mercantile Company;

No. 65375, September 24, 1907, August L. Jaenicke;

No. 41115, September 15, 1903, The Sunland Orchard Company;

No. 26096, February 19, 1895, National Milling Company;

No. 27956, March 17, 1896, The Waterloo Yeast Company;

No. 50369, March 13, 1906, George Frank;

No. 54427, June 26, 1906, George Frank;

No. 56340, September 11, 1906, Sunlight Hominy Company;

No. 44025, January 24, 1905, The Force Food Company;

No. 55816, August 21, 1906, The Force Food Company;

No. 31049, December 28, 1897, New York Condensed Milk Company;

No. 39035, October 14, 1902, The T. A. Snider Preserve Company;

No. 49670, February 13, 1906, Portland Packing Company;

No. 19625, June 2, 1891, Portland Packing Company;

No. 21387, June 28, 1892, L. J. Rose & Company, Ltd.;

No. 31830, August 2, 1898, Byrd G. Pollard;

No. 32420, January 24, 1899, Swift & Company;

No. 52761, May 15, 1906, Russell & Company;

No. 54584, June 26, 1906, Albert Edward Tate;

No. 42591, May 10, 1904, Kentucky Refining Company;

No. 57687, November 27, 1906, A. H. Herrick & Son;

No. 66384, November 26, 1907, Bosman & Lohman Company;

No. 17930, May 20, 1890, Joseph Tetley & Co.;

No. 58636, December 18, 1906, Consumers' Coffee Co. of No. O. Ltd.;

No. 80208, November 22, 1910, Norval Landon Burchell;

No. 82823, July 25, 1911, Woolson Spice Company;

No. 91450, May 6, 1913, Austin, Nichols & Co.;

No. 93576, September 23, 1913, The Woolson Spice Co.;

No. 102051, January 26, 1915, Cheek-Neal Coffee Co.;

No. 110108, May 2, 1916, Joseph Tetley & Co. Inc.;

No. 118395, September 4, 1917, Edmands Coffee Company;

No. 123327, October 29, 1918, The Brundage Brothers Company. [45]

14.

For a further and separate defense, defendant alleges that neither complainant nor The J. K. Armsby Company is the exclusive owner of the word "Sun-Kist" for trade-mark use and that such word has been commonly and extensively used by others as a trade-mark applied to foods and ingredients of foods, either alone or as part of a composite mark, as appears from the following trade-mark registrations in the United States Patent Office:

No. 72087 (Renewed), January 5, 1909, California Fruit Growers Exchange, Los Angeles, California, for oranges;

No. 85069, January 30, 1912, California Fruit Growers Exchange, Los Angeles, California, lemons;

No. 117107, June 19, 1917, California Fruit Growers Exchange, Los Angeles, California, for citrus fruits;

No. 92809, July 29, 1913, Maney Milling Company, wheat flour;

No. 102222, January 26, 1915, Ward Baking Company, cakes;

No. 111055, June 20, 1916, Redbanks Orchard Company, table grapes;

No. 176568, November 27, 1923, Sunkist Lemon Pie Company, lemon meringue pies.

15.

For a further and separate defense, defendant alleges that there is no deceptive similarity nor possibility of public confusion between "Sun-Maid" and "Sun-Kist" as trade-marks applied to foods and ingredients of foods, and that the United States Patent Office, notwithstanding previous trade-mark registrations of "Sun-Kist" as applied to foods and ingredients of foods has consistently and repeatedly allowed and registered the trade-mark "Sun-Maid" to defendant as applied to foods and ingredients of foods. [46]

16.

For a further and separate defense, defendant alleges that there is no deceptive similarity nor possibility of public confusion between "Sun-Maid" and "Sun-Kist," as trade-marks applied to foods and ingredients of foods, and that such lack of

deceptive similarity and public confusion was admitted by complainant and said The J. K. Armsby Company in said alleged agreement dated March 10, 1917, if in fact such agreement was ever made as stated in the bill of complaint herein, defendant alleging on information and belief that such agreement provides that said California Associated Raisin Company and said The J. K. Armsby Company may continue to use respectively the trade-marks "Sun-Maid" and "Sun-Kist" as applied to raisins.

17.

For a further and separate defense, defendant alleges that there is no deceptive similarity nor possibility of public confusion between "Sun-Maid" and "Sun-Kist" as trade-marks applied to foods and ingredients of foods, and that such lack of deceptive similarity and public confusion was admitted by complainant and said The J. K. Armsby Company, and settled by decree of court, when the suit brought in the United States District Court for the Southern District of New York, and more specifically referred to in Paragraph IX of the bill of complaint herein, was dismissed by complainant therein on or about April 18, 1917.

18.

For a further and separate defense, defendant alleges on information and belief, that since March 10, 1917, the date of said alleged agreement, California Associated Raisin Company (later changed to Sun-Maid Raisin Growers) and Sun-Maid Raisin

Growers of California, defendant herein, on one hand, and [47] The J. K. Armsby Company and California Packing Corporation, complainant herein, on the other hand, have continuously, extensively, and competitively used the trade-marks "Sun-Maid" and "Sun-Kist" respectively, as applied to raisins and said Sun-Maid Raisin Growers of California and said California Packing Corporation are now so using the respective trade-marks "Sun-Maid" and "Sun-Kist" as applied to the same product, namely raisins, without any confusion resulting.

19.

For a further and separate defense, defendant alleges that its right to use the trade-mark "Sun-Maid," as applied to canned goods, canned fruits, canned vegetables, catsup, jam, jelly, canned soup and upon certain other food products, was not acquired by assignment or otherwise from said California Associated Raisin Company, but by reason of defendant's own adoption and first use thereof on said products.

20.

For a further and separate defense, defendant alleges that its right to use the trade-mark "Sun-Maid" as applied to rice, extracts, fish, cereals, tea, coffee, spices, and certain other food products, was not acquired by assignment or otherwise from California Associated Raisin Company, but by reason of adoption and first use thereof by San Joaquin Grocery Co. and its predecessors, of Fresno, California, on or about January 16, 1916, which trade-

mark as applied to said products and goodwill connected therewith was assigned to defendant herein on or about August 11, 1924. [48]

21.

For a further and separate defense, defendant alleges on information and belief that said alleged agreement dated March 10, 1917, if in fact such agreement was ever made as stated in the bill of complaint herein, is void and not binding on defendant herein by reason of constituting undue restraint of trade and as being against public policy.

22.

For a further and separate defense, defendant alleges on information and belief that the said alleged agreement dated March 10, 1917, if in fact such agreement was ever made as stated in the bill of complaint herein, is binding, if at all, only upon the parties thereto and any person, firm, or corporation, to which said California Associated Raisin Company might thereafter issue a license to use said trade-mark "Sun-Maid," but that it is specifically provided in said alleged agreement that nothing therein contained should be construed to limit the right of said California Associated Raisin Company to sell or assign said trade-mark.

23.

For a further and separate defense, defendant alleges that complainant herein is estopped, because of laches and unreasonable delay in bringing this suit, by reason of the following facts, to wit:

The trade-mark "Sun-Maid" was adopted and first used by San Joaquin Grocery Co. and its predecessors, as applied to food flavoring extracts, canned fish, nuts in their natural state, table sirup, mincemeat, cornstarch, canned meats, canned corned beef, [49] rice, pickles, sauces for food flavoring purposes, vinegar, edible oil, molasses, breakfast cereals, teas, coffees, and spices, as early as January 16, 1916; thereafter and on or about June 20, 1923, said San Joaquin Grocery Co. filed an application in the United States Patent Office, for registration of said trade-mark "Sun-Maid," applied to said products above named; thereafter such application for registration was allowed by the United States Patent Office and said trade-mark "Sun-Maid" was published on June 3, 1924, in the Official Gazette of the Patent Office, Vol. 323, page 13; thereafter and on or about August 11, 1924, said San Joaquin Grocery Co. assigned and transferred said trade-mark "Sun-Maid" used as aforesaid, together with the goodwill in connection therewith, to Sun-Maid Raisin Growers of California, defendant herein, and said trade-mark was duly registered in the name of defendant on or about January 6, 1925, as No. 193,753; thereafter and on or about February 13, 1926, said Sun-Maid Raisin Growers of California adopted and first used the trade-mark "Sun-Maid" as applied to baking powder and on or about December 22, 1926, filed an application in the United States Patent Office, for registration of said trade-mark as applied to baking powder; there-

after such application for registration was allowed by the United States Patent Office and said trade-mark "Sun-Maid" was published on February 8, 1927, in the Official Gazette of the Patent Office, vol. 355, page 221, and duly registered by defendant on or about April 19, 1927, as No. 226,774.

The use of said trade-mark "Sun-Maid" on all of the aforesaid products, and on many other food products, has been continuously, and publicly carried on by San Joaquin Grocery Co. and by Sun-Maid Raisin Growers of California in the regular course of trade, since the adoption and first use thereof by the respective companies as aforesaid, and said trade-mark "Sun-Maid" is now so being used [50] by Sun-Maid Raisin Growers of California, representing a valuable goodwill and trade-mark right.

Defendant alleges on information and belief that complainant herein has subscribed to said Official Gazette for more than six years last past, and through its officers and employees saw and knew of said trade-mark publications and registrations of the trade-mark "Sun-Maid" applied to food products other than raisins and that said complainant as early as January 16, 1916, and continuously thereafter, through its officers and employees, saw and knew that said trade-mark "Sun-Maid" was being publicly used, first by San Joaquin Grocery Co. and later by defendant herein, in the regular course of trade, on the products above specifically named and on many other food products, but not-

withstanding said knowledge, said complainant made no protest or complaint of any kind or character to defendant herein, until on or about the 4th day of March, 1929, when defendant was notified as alleged in Paragraph X of the bill of complaint herein.

24.

As a separate and complete defense to the cause of action alleged in the bill of complaint this defendant avers that the complainant does not come into equity with clean hands for the following reasons: Complainant alleges in Paragraph IV of said bill of complaint that it acquired its right to the alleged trade-mark "Sun-Kist" from The J. K. Armsby Company and that it is the successor in business of The J. K. Armsby Company which, it is alleged, carried on a business similar to that of complainant and created a very valuable goodwill under said alleged trade-mark "Sun-Kist," and in Paragraph VI that the said goods to which The J. K. Armsby Company applied its said trade-mark "Sun-Kist" were carefully selected and prepared and were of superior excellence and acquired a reputation and demand and embodied the skill, care and [51] probity prevailing in the business of said The J. K. Armsby Company, and that complainant acquired the business goodwill and trade-marks of the said The J. K. Armsby Company on the 8th day of November, 1916. It is nowhere alleged in the said bill of complaint that the complainant in connection with its alleged trade-mark "Sun-Kist" ever announced its successorship to The J. K.

Armsby Company, and the fact is that it has never done so. A specimen of complainant's "Sun-Kist" label is filed herewith as defendant's Exhibit "A."

Wherefore complainant does not come into equity with clean hands and its bill should be dismissed.

25.

As a separate and complete defense to the cause of action alleged in the bill of complaint this defendant avers that complainant does not come into equity with clean hands for the following reasons: It is alleged in said bill of complaint that on or about the day of June, 1915, the said The J. K. Armsby Company brought suit in the United States District Court in and for the Southern District of New York against two individuals residing in the said district of New York who were at that time using the trade-mark "Sun-Maid" in said district in connection with the sale of raisins which had been produced by said California Associated Raisin Company; that in said suit said The J. K. Armsby Company claimed that use of the name "Sun-Maid" was an infringement upon the rights of said The J. K. Armsby Company in, to or in connection with said trade-mark "Sun-Kist" alleged to belong to said The J. K. Armsby Company and that The J. K. Armsby Company in said suit prayed for an injunction against the said defendant's use of the said trade-mark "Sun-Maid"; that thereafter a written agreement was entered into with the complainant and said The J. K. Armsby Company and

the defendants to said suit and [52] others, wherein and whereby it was covenanted and agreed by all of the said parties to said agreement that said suit should be dismissed and that the defendants should continue to use the trade-mark "Sun-Maid" in connection with the packing and sale of raisins and other food products and confections containing raisins; and that neither The J. K. Armsby Company nor complainant should be required to relinquish its right to the use of the said trade-mark "Sun-Kist" in connection with the packing and sale of raisins or other food products.

In its bill of complaint in Paragraph XI thereof, complainant alleges that the words "Sun-Kist" and "Sun-Maid" closely resemble each other and that the use of the trade-mark "Sun-Maid" would and does deceive the public and cause purchasers to buy the goods of defendant in the belief that the said goods are the "Sun-Kist" goods of complainant and that the use thereof has promoted and will promote mistake, confusion and fraudulent substitution.

Therefore the complainant by the contract aforesaid, upon its own allegations has permitted the use of the word "Sun-Maid" upon raisins with the result according to its own statement that such use results in and promotes deception and fraud upon the public. The said contract is therefore void as against public policy and complainant's claiming rights thereunder bases its claim upon an arrangement to which it is a party, which according to its

own statement results in deception of the public and fraud. Therefore complainant does not come into equity with clean hands and its bill should be dismissed.

Wherefore defendant prays that said bill of complaint be dismissed with costs to defendant.

SUN-MAID RAISIN
GROWERS OF CALIFORNIA,

By /s/ MILLER & BOYKEN,
Its Solicitors.

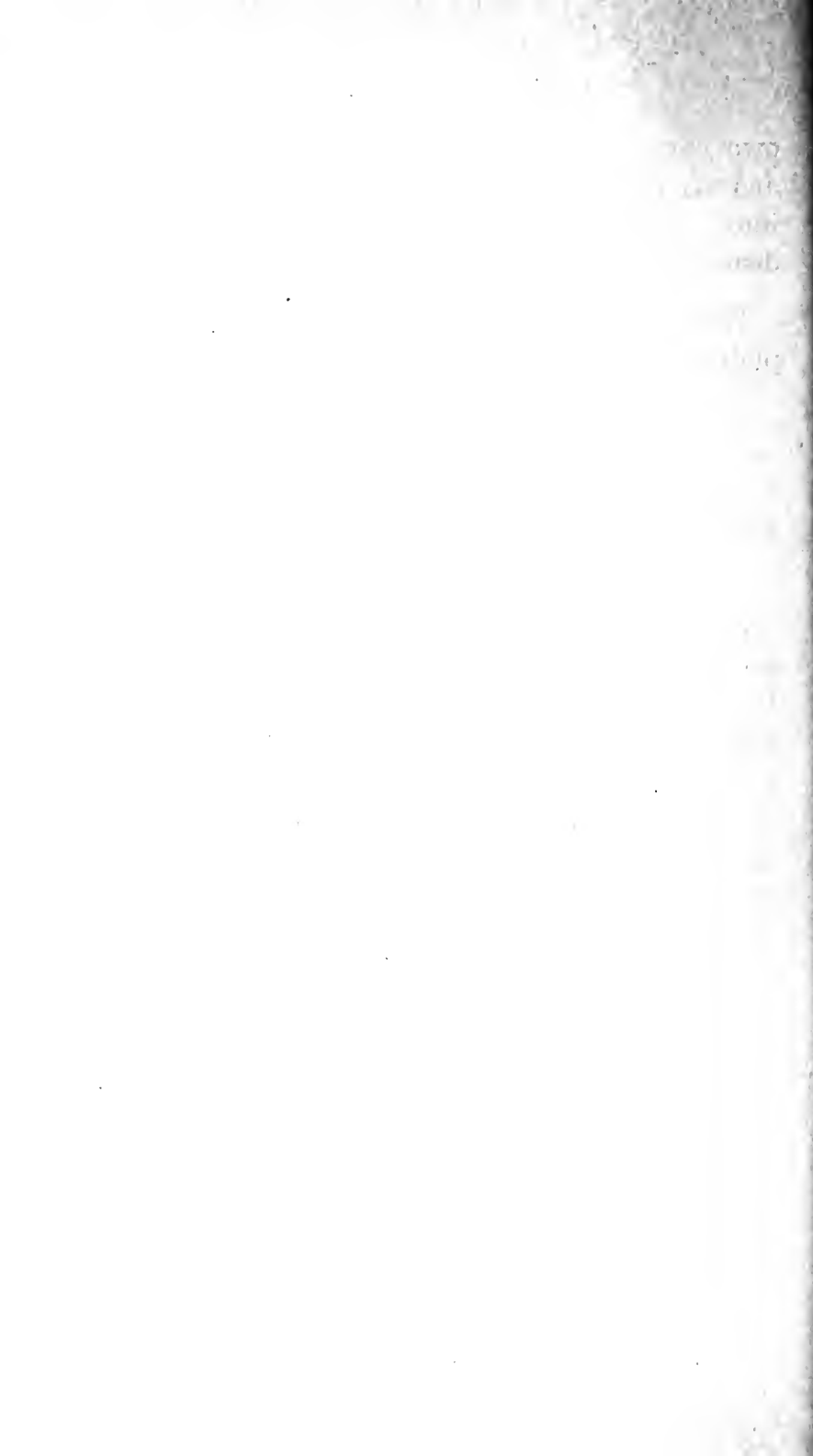
/s/ JOHN H. MILLER,

/s/ A. W. BOYKEN,

/s/ E. S. ROGERS,

/s/ ALLEN M. REED,

Of Counsel.



SUN-KIST

BRAND

NET WEIGHT
1 LB. 4 OZ.



SELECTED
MEDIUM SIZE FRUIT
PACKED IN HEAVY SYRUP

YELLOW CLING PEACHES

QUALITY

From the Land of Sunshine

FRUIT'S

SUN-KIST

YELLOW CLING PEACHES
PACKED IN FOUR SIZES

NO. 2 1/2 CAN

EXTRA LARGE FRUIT

NO. 2 1/2 CAN

LARGE SIZE FRUIT

NO. 2 CAN

SELECTED

MEDIUM SIZE FRUIT

NO. 1 CAN

SELECTED

SMALL SIZE FRUIT

CALIFORNIA

PACIFIC CORPORATION

MADE IN U.S.A.

SAN FRANCISCO

CALIFORNIA U.S.A.

PACKED IN U.S.A.

SUN-KIST

BRAND

NET WEIGHT
1 LB. 4 OZ.



SELECTED
MEDIUM SIZE FRUIT
PACKED IN HEAVY SYRUP

YELLOW CLING PEACHES

Endorsed: Filed June 9, 1930.



[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The Court makes the following findings of fact and conclusions of law in accordance with Rule 70½:

Findings of Fact

1.

Complainant, California Packing Corporation, is, and at all times mentioned in the bill of complaint, has been, a corporation organized and existing under the laws of the State of New York.

2.

Defendant, Sun-Maid Raisin Growers of California, is, and at all times mentioned in the bill of complaint, has been, a corporation organized and existing under the laws of the State of California, having its principal place of business in the City of Fresno, and within the Southern District of California.

3.

This is a suit of a civil nature in equity, wherein the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000). [55]

4.

Complainant is the successor in business of The J. K. Armsby Company, a corporation organized under the laws of the State of Illinois.

5.

The J. K. Armsby Company had used, and complainant is now using, the trade-mark "Sun-Kist" in interstate commerce for many kinds of food products. Said trade-mark has been registered in the United States Patent Office.

6.

Defendant has used the trade-mark "Sun-Maid" in interstate commerce for many kinds of food products. Said trade-mark has also been registered in the United States Patent Office.

7.

On or about March 10, 1917, California Associated Raisin Company made and entered into a written agreement, in evidence herein, with Griffin & Skelley Company, a corporation, and California Fruit Cannery Association, a corporation, which said agreement relates in part to the use of said trade-mark "Sun-Maid," said agreement being also adopted and approved by complainant and said The J. K. Armsby Company on March 10, 1917.

8.

On February 17, 1922, the California Associated Raisin Company changed its name to Sun-Maid Raisin Growers. On August 1, 1923, Sun-Maid Raisin Growers sold the trade-mark "Sun-Maid" as applied to raisins, and the business and goodwill associated therewith, to defendant, Sun-Maid Raisin Growers of California, a co-operative non-profit corporation organized under California law on May

29, 1923. On January 3, 1924, Sun-Maid Raisin Growers was adjudicated bankrupt and Milo L. Rowell was appointed trustee. Rowell, on June 9, 1924, assigned to defendant [56] the "Sun-Maid" trade-mark and all registrations of it. This assignment was confirmed by the bankruptcy court on July 19, 1924, which order also recited and confirmed the assignments previously made by the bankrupt as above stated. These were attached and by reference made part of the order. Other assets of Sun-Maid Raisin Growers valued at \$6,000,000, its plant, equipment and personal property other than raisins, were sold to a Delaware corporation organization on March 26, 1923.

9.

Defendant acquired the "Sun-Maid" trade-mark and the appurtenant business and goodwill from the Sun-Maid Raisin Growers, which was the successor of California Associated Raisin Company, in good faith and for a valuable consideration.

10.

Defendant had no knowledge of the existence or terms of the agreement of March 10, 1917, or of any claim by complainant for infringement of the "Sun-Kist" trade-mark until sometime during the year 1929 when, for the first time, said contract was called to defendant's attention by complainant, and complainant then notified defendant to desist from using the "Sun-Maid" trade-mark on non-raisin goods.

11.

Complainant ever since approximately March 10, 1917, has had said contract in its possession and has been at all times familiar with its terms.

12.

Prior to the year 1929, complainant permitted defendant, without objection or remonstrance, publicly to claim ownership in the "Sun-Maid" trade-mark for non-raisin goods, and with knowledge of defendant's use on non-raisin goods permitted defendant to build up a substantial market for [57] food products, including non-raisin goods bearing the trade-mark "Sun-Maid," as is more fully set forth in the Memorandum of Decision on file herein.

13.

Complainant, since 1918, has had knowledge, actual or constructive, of the claim of ownership by registrations, issued or assigned to defendant, of the trade-mark "Sun-Maid" applied to food products other than those composed of or containing raisins, and since 1926, of defendant's sale of goods other than raisins bearing the trade-mark "Sun-Maid."

14.

The word "Sun" is and has been, long prior to complainant's adoption thereof, in widespread use as a part of trade-marks applied to food products ordinarily dealt in by grocers, and has been registered in the Patent Office as a part of trade-marks by other parties than the parties hereto, who have

used that word prior to the use by the parties hereto on a wide range of food products.

15.

The name "Sun-Maid," both with and without the Sun-Maid girl picture, indicates and is understood to indicate in the grocery trade and to the public, that the goods to which it is applied come from the defendant.

16.

Defendant in this case has not acted fraudulently and is not seeking to take advantage of complainant's reputation or the reputation of its "Sun-Kist" goods. Defendant is acting in good faith and there is no confusing similarity between the two trademarks in suit. The use by defendant of the trademark "Sun-Maid" is not likely to, and does not, produce any confusion or mistake, or represent directly or indirectly that defendant's goods come from complainant.

Conclusions of Law

1.

This Court has jurisdiction of the parties hereto and the subject matter of this cause.

2.

The word "Sun-Maid" is not an infringement of "Sun-Kist" when both are used on goods of the same descriptive properties.

3.

Complainant, by its laches and acquiescence, is estopped from enforcing against defendant the provisions of the contract of March 10, 1917.

4.

Defendant has the right to use its "Sun-Maid" trade-mark on and as applied, not only to raisin goods, but to non-raisin goods.

5.

Complainant is not entitled to an injunction restraining the use by defendant of its trade-mark "Sun-Maid" upon its non-raisin goods.

6.

Complainant is not entitled to the relief prayed for in its bill of complaint, or any part thereof, or to any relief whatsoever.

7.

Said bill of complaint should be dismissed for want of equity and defendant should recover its costs of suit.

Dated: March 26th, 1934.

/s/ PAUL J. McCORMICK,
U. S. District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 26, 1934. [58]

[Title of District Court and Cause.]

FINAL DECREE OF DISMISSAL

This cause came on to be heard at this term and was argued by counsel and submitted for decision; and upon consideration thereof, the Court having filed its Memorandum of Decision, and its separate findings of fact and conclusions of law, it is hereby

Ordered, Adjudged and Decreed that the bill of complaint herein be and the same is hereby dismissed with costs to defendant taxed in the sum of \$137.30

Dated: March 26th, 1934.

/s/ PAUL J. McCORMICK,
U. S. District Judge.

Approved as to form: (Rule 44).

PILLSBURY MADISON &
SUTRO,
Attorneys for Complainant.

[Endorsed]: Filed and entered March 26, 1934.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 7701

CALIFORNIA PACKING CORPORATION,
a Corporation,

vs.

SUN-MAID RAISIN GROWERS OF CALI-
FORNIA, a Corporation.

MANDATE

United States of America, ss:

The President of the United States of America

To the Honorable the Judges of the District Court
of the United States for the Southern District
of California, Northern Division—Greeting:

Whereas, lately in the District Court of the United States for the Southern District of California, Northern Division, before you, or some of you, in a cause between California Packing Corporation, a corporation, complainant, and Sun-Maid Raisin Growers of California, a corporation, defendant, In Equity No. C-104-M, a Final Decree was duly filed and entered on the 26th day of March, 1934, which said Decree is of record and fully set out in said cause in the office of the clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof, and as by the inspection of the Tran-

script of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by California Packing Corporation, a corporation, as appellant, against Sun-Maid Raisin Growers of California, a corporation, as appellee, agreeably to the Act of Congress in such cases made and provided, fully and at large appears:

And Whereas, on the 24th day of April in the year of our Lord One Thousand, Nine Hundred and Thirty-five the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record and was duly argued and submitted. [63]

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and hereby is reversed, with costs in favor of the appellant and against the appellee.

It is further ordered, adjudged and decreed by this Court, that the appellant recover against the appellee for its costs herein expended and have execution therefor. (February 3, 1936.)

You, Therefore, Are Hereby Commanded, That such execution and further proceedings be had in the said cause in accordance with the opinion and decree of this court, and as according to right and justice and the laws of the United States ought to

be had, the said decree of the said District Court notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the 25th day of May, in the year of our Lord One Thousand Nine Hundred and thirty-six.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

Amount of Costs Allowed and Taxed

In favor of appellant and against appellee as per Annexed Bill of Items, Taxed in Detail: \$337.54.

/s/ PAUL P. O'BRIEN,
Clerk.

[Endorsed]: Filed June 15, 1936. [64]

[Title of District Court and Cause.]

MINUTE ENTRY

June 15, 1936

This cause coming on for hearing on Motion for order for filing and spreading Mandate and for Decree on Mandate, pursuant to notice filed June 1, 1936; L. B. Groezinger, Esq., appearing for the plaintiff, moves that the Mandate be filed and spread upon the minutes of this court, whereupon, there being no appearance in opposition, the Court orders said motion granted, and the Mandate, re-

versing the Decree of this court, is ordered filed and spread; said Mandate being as follows, to wit:

* * *

A Decree pursuant to the Mandate is now presented to the Court, and having been signed, is ordered filed and entered herein, to wit:

* * *

12/603 [66]

[Title of District Court and Cause.]

FINAL DECREE

The above-named California Packing Corporation, the complainant in the above-entitled cause, having duly appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree made and entered herein on the 26th day of March, 1934, dismissing the bill of complaint; the said United States Circuit Court of Appeals for the Ninth Circuit having duly heard the said appeal upon the transcript of the record and having reversed the said decree of the District Court of the United States for the Southern District of California, Northern Division, with costs, and having ordered, adjudged and decreed that said complainant recover against said defendant \$337.54 for its costs in said United States Circuit Court of Appeals for the Ninth Circuit and that it have execution therefor; the said United States Circuit Court of Appeals for the Ninth Circuit having re-

manded the said cause to the said district court with instructions that this court take such further proceedings in conformity to the opinion and decree of said court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding, which order, decree, opinion and instructions appear to this court by the mandate of the said United States Circuit Court of Appeals for the Ninth Circuit. [67]

Now, Therefore, it is Ordered that said mandate be filed herein and spread upon the minutes of this court, and on reading and filing said mandate and in pursuance thereof,

It is Ordered, Adjudged and Decreed that this court, by virtue of the power and authority therein vested, and in obedience to the said mandate, doth order, adjudge and decree that the decree made and entered herein, dated March 26, 1934, be, and it is hereby, vacated and set aside; and

It is further Ordered, Adjudged and Decreed that an injunction issue herein perpetually enjoining and restraining the defendant, its agents and servants, and all claiming and holding through or under it, from using the trade-mark "Sun-Maid" otherwise than on packages containing raisins or on packages containing food products or confections made wholly or in part from raisins, provided that such injunction shall not enjoin or restrain defendant from using its present corporate name; and

It is further Ordered, Adjudged and Decreed

that complainant have execution for its costs of appeal in the amount of \$337.54, and that complainant take nothing in the way of damages against defendant but that complainant also recover its costs in this court taxed at \$156.55.

Dated: June 15th, 1936.

/s/ PAUL J. McCORMICK,
United States District Judge.

Approved as to form, as provided in Rule 44.

/s/ E. S. ROGERS,
/s/ MILLER & BOYKEN,
Attorneys for Defendant.

[Endorsed]: Filed and entered June 15, 1936.

[Title of District Court and Cause.]

WRIT OF INJUNCTION

United States of America,
Southern District of California—ss.

The President of the United States of America to
Sun-Maid Raisin Growers of California, Its
Agents and Servants, and All Claiming and
Holding Through or Under It, Greeting:

Whereas California Packing Corporation has filed
on the equity side of the District Court of the

United States for the Southern District of California, Northern Division, a bill of complaint against Sun-Maid Raisin Growers of California, and has obtained an allowance for an injunction as prayed for in said bill,

Now, Therefore, we, having regard to the matters in said bill contained, do hereby command and strictly enjoin you, the said Sun-Maid Raisin Growers of California, your agents and servants, and all claiming and holding through or under you, from using the trade-mark "Sun-Maid" otherwise than on packages containing raisins or on packages containing food products or confections made wholly or in part from raisins (nothing herein [70] contained shall enjoin or restrain you, the said Sun-Maid Raisin Growers of California, from using your present corporate name), which commands and injunctions you are respectively required to observe and obey perpetually.

Whereof, fail not under penalty of the law thence ensuing.

Witness, the Honorable Paul J. McCormick, Judge of the District Court of the United States for the Southern District of California, this 15th day of June, 1936, and in the 160th year of the independence of the United States of America.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States for
the Southern District of California.

[Seal] By /s/ EDMUND L. SMITH,
Deputy Clerk.

PILLSBURY, MADISON &
SUTRO,
Attorneys for Complainant.

Return on Service of Writ attached.

[Endorsed]: Filed June 18, 1936. [71]

[Title of District Court and Cause.]

No. C-104-M

State of California,
County of Fresno—ss.

SUPPLEMENTAL AFFIDAVIT OF
EARLE G. GRANGER

Earle G. Granger, being duly sworn, deposes and says that he is Secretary of Sun-Maid Raisin Growers of California, defendant in the above-entitled case; that at the time of trial of said case he was Assistant Secretary of defendant corporation and has been associated with defendant corporation since that time; that he was present at said trial and is familiar with the circumstances surrounding the suit by plaintiff, California Packing Corporation, against defendant corporation and has been cognizant of, and bound by, the injunction issued in

said case by the Honorable Paul J. McCormick on June 15, 1936; that said injunction was based upon ownership and use by plaintiff, California Packing Corporation, of the trade-mark Sun-Kist; that to the best of affiant's knowledge and belief, plaintiff has abandoned the use of the mark Sun-Kist and no longer uses the trade-mark Sun-Kist on either raisin or non-raisin food products, and affiant has been advised and believes that the trade-mark Sun-Kist is no longer the property of plaintiff corporation, having been assigned with [73] the good will of the business pertaining thereto, to Sunkist Growers of Los Angeles, California, for approximately \$1,000,000; that affiant has advised Sunkist Growers of Los Angeles of defendant's desire to have said injunction dissolved and said Sunkist Growers of Los Angeles has informed affiant that the matter is one to be resolved between defendant and plaintiff, and that it desired neither to consent or object thereto; that, in the past, others have attempted, to the detriment of defendant, to use the word Sun-Maid or a colorable imitation thereof, on non-raisin food products; that similar instances of such unauthorized use of the name Sun-Maid are likely to occur in the future; that in affiant's opinion said injunction precludes defendants from taking all necessary preventive steps to stop such unauthorized use of defendant's name in the future.

[Seal] /s/ EARLE G. GRANGER,
Secretary.

Subscribed and sworn to before me this 18th day of January, 1955.

/s/ DOROTHY B. LANDSTROM,
Notary Public in and for the County of Fresno,
State of California.

[Endorsed]: Filed January 21, 1955. [74]

[Title of District Court and Cause.]

MOTION TO DISSOLVE INJUNCTION OR, IN
THE ALTERNATIVE, TO JOIN SUNKIST
GROWERS, INC. AS A PARTY

Comes now defendant, Sun-Maid Raisin Growers of California, and moves this court to dissolve the injunction dated June 15, 1936, and issued by the Honorable Paul J. McCormick, pursuant to a final decree of the same date.

This motion is made on the ground that no justification now exists for continuation of the injunction and defendant will be unjustly damaged as long as said injunction is in effect.

Said injunction was based upon the ownership, by plaintiff, California Packing Corporation, of the trade-mark Sun-Kist and was issued for the purpose of protecting certain rights residing in plaintiff at the date of said injunction by virtue of the ownership and use by plaintiff of said [77] trade-

mark. Since said injunction issued, the trade-mark Sun-Kist has been abandoned by plaintiff, and any rights to the trade-mark Sun-Kist have been assigned or transferred by plaintiff and no longer reside in plaintiff.

Mandate from the Court of Appeals for the Ninth Circuit granting permission to bring this motion has been filed. See also 244 F. 2d 895.

In the alternative, defendant moves that an order issue from this Court joining Sunkist Growers, Inc. (formerly California Fruit Growers Exchange), as a party if the Court finds that it is a necessary or indispensable party.

In support of the motions defendant will rely on the deposition of F. R. Wilcox, General Manager of Sunkist Growers, Inc., taken in Los Angeles on June 6, 1957, and on the existing record in The Court of Appeals.

BOYKEN, MOHLER & WOOD,

By /s/ GORDON WOOD,

Attorneys for Defendant.

San Francisco, California, May 29, 1958.

[Endorsed]: Filed June 4, 1958. [78]

[Title of District Court and Cause.]

OPINION

Appearances:

For the Plaintiff:

PILLSBURY, MADISON & SUTRO,

By GEORGE A. SEARS, Esq.,

San Francisco, California.

For the Defendant:

BOYKEN, MOHLER & WOOD,

By GORDON WOOD, Esq.,

San Francisco, California. [91]

Yankwich, Chief Judge:

This is a motion by the defendant Sun-Maid Raisin Growers of California, to be referred to, at times, as Sun-Maid, to dissolve the injunction issued in this case on June 15, 1936, or, in the alternative, to join Sun-Kist Growers, Inc., as a party. The gist of the demand for relief is stated by the movant substantially in this manner:

The basis for the motion is the general power of the Equity Courts to relieve a person of the effect of an injunction if conditions have changed, and the direct provision of Subdivision (b)(5) of Rule 60 of the Federal Rule of Civil Procedure which authorizes the court to relieve a person from a final judgment when "it is no longer equitable that the judgment should have prospective application

* * *."

I.

The Prior Proceedings

A proper understanding of the motion requires an outline of facts from which the litigation stemmed.

The action was begun on October 16, 1929, by a complaint filed by the plaintiff, California Packing Company, a corporation, seeking to restrain the defendant from using the trade-mark Sun-Maid on any products other than raisins or raisin products. The plaintiff was the owner of the trade-mark Sun-Kist. On June 15, 1915, an action had been instituted in the United States District Court for the Southern District [92] of New York by plaintiff's predecessor, J. K. Armsby Co., against Ernest L. Heebner and Archibald C. Clark. In it, it was alleged that the J. K. Armsby Co. owned the trade-mark Sun-Kist, which was infringed by the trade-mark Sun-Maid used by the defendants. The action was settled by an agreement whereby plaintiff's predecessor granted to Sun-Maid the right to use Sun-Maid on raisins or raisin products only. In the instant suit, it was alleged that the plaintiff had acquired the right of the predecessor to the business then conducted by them, that of preparing and marketing foods and ingredients of foods and the good will, and that the trade-mark of the plaintiff's predecessor was included.

It was alleged that the plaintiff's predecessor had used the trade-mark Sun-Kist from about 1903 to such an extent that, in the mind of the public,

the word Sun-Kist became associated with their products, which included canned fruits, vegetables, jams, jellies and other products, and that the trade-mark was registered on various occasions to cover various products, beginning with the first registration on January 28, 1908, the last one being on October 10, 1916.

On November 8, 1916, the Armsby Company assigned to the plaintiff the right to use the trade-mark Sun-Kist. On March 10, 1917, an agreement was entered into between the then parties to the lawsuit. In consideration of the settlement of the controversy, the California Associated Raisin Company, defendant's predecessor, was given the right to use the name Sun-Maid on raisins and raisin products only. The California [93] Associated Raisin Company changed its name on February 17, 1922, to Sun-Maid Raisin Growers.

In 1923, Sun-Maid Raisin Growers found itself in financial difficulties which led to the determination that it would have to liquidate its business and dispose of its assets. The defendant was organized for the purpose of taking over its raisin packing business. On August 1, 1923, a contract was entered into between the Sun-Maid Raisin Growers and the defendant by which, among other things, it agreed to transfer its raisin packing business and the good will, including the applicable trade-marks. On June 3, 1924, Sun-Maid Raisin Growers was adjudged a bankrupt. In the bankruptcy proceedings, its assets, including the trade-mark Sun-Maid were transferred to the defendant in accordance with the

Agreement of August 1, 1923. Of the effect of this contract, the Court of Appeals has said:

“The appellee (defendant here) claims that it had no knowledge of the agreement of March 10, 1917, and is not bound thereby, and that the agreements contained in that contract to be performed on behalf of its predecessor are covenants which do not run with the personal property assigned and are binding only on the parties to the contract. This contention overlooks the character of the trade-mark and the right to its use. The California Associated Raisin Company, under its own name, the Sun-Maid Raisin Growers, could not convey any right to the use of a trade-mark which it did not own, and that right had been [94] expressly limited by the agreement of March 10, 1917, wherein the parties had agreed to limit the use of that trade-mark to raisins and raisin products. Consequently, the trustee in bankruptcy sold that right and no other. By its agreement to refrain from using the trade-mark ‘Sun-Maid’ on any other than raisin products, it acquired the unquestioned right, so far as the parties here involved were concerned, to the use of that trade-mark on raisin products. The contract of settlement of the divers claims of the parties to the use of the trade-mark ‘Sun-Maid’ and ‘Sun-Kist’ was based upon mutual concessions as to doubtful claims. The appellee has enjoyed the fruits of that contract ever since it was executed and has packed nearly \$250,000,000 worth of raisin products under the trade-mark ‘Sun-Maid.’ The appellee having purchased the rights of one of the

parties to the contract of March 10, 1917, cannot avoid the corresponding burden." (California Packing Corporation v. Sun-Maid Raisin Growers, 1936, 9 Cir., 81 F. 2d 674, 676-677.) (Emphasis added.)

To continue with the allegations of the Complaint in the present case:

It was alleged that, on January 1, 1929, the defendants had, in violation of the Agreement, applied the word Sun-Maid to canned goods, canned fruits and vegetables and other products [95] of the same class which had been preempted by plaintiff's predecessor under the trade-mark Sun-Kist, in violation of the Agreement of March 10, 1917, and that the similarity between the two trade-marks was such as to create confusion as to the source and sponsorship of the goods.

The Complaint asked that the defendant be enjoined from using the trade-mark Sun-Maid otherwise than on packages containing raisins or raisin products or confections made wholly from raisins.

The Answer, which, in effect, admitted the existence of the contract, denied that the defendant, at the time it acquired, in bankruptcy, the rights of its predecessor, knew of its existence, disputed the claimed confusing similarity between the two trade-marks and pleaded laches.

In other respects, the Answer need not concern us because Judge Paul J. McCormick, in his judgment, found generally in favor of the defendant. His findings, dated March 12, 1934, were preceded by a published opinion, dated February 23, 1934, (California Packing Corp. v. Sun-Maid Raisin

Growers of California, 1934, D.C. Cal., 7 F. Supp. 497) which, in substance, while holding that the defendant did not know of the existence of the contract of March 10, 1917, ruled that it, nevertheless, was bound by it. However, he denied relief upon the ground of laches in failing to institute proceedings against Sun-Maid for the use of the trade-mark on other than raisin products. Certain findings and conclusions of law only are important because they are among the grounds urged for the present motion. They read:

Finding 15: [96]

“The name ‘Sun-Maid’ both with and without the Sun-Maid girl picture, indicates and is understood to indicate in the grocery trade and to the public, that the goods to which it is applied comes from the defendant.”

Finding 16:

“Defendant in this case has not acted fraudulently and is not seeking to take advantage of complainant’s reputation or the reputation of its ‘Sun-Kist’ goods. Defendant is acting in good faith and there is no confusing similarity between the two trade-marks in suit. The use by defendant of the trade-mark ‘Sun-Maid’ is not likely to, and does not, produce any confusion or mistake, or represent directly or indirectly that defendant’s goods come from complainant.”

Conclusions of Law 2 and 4 read:

“2. The word ‘Sun-Maid’ is not an infringe-

ment of 'Sun-Kist' when both are used on goods of the same descriptive properties.

"4. Defendant has the right to use its 'Sun-Maid' trade-mark on and as applied, not only to raisin goods, but to non-raisin goods."

These conclusions were not carried over into the judgment. Absent a counterclaim for declaratory relief (28 U.S.C.A., §§2201, 2202), for the defendant as to the validity or infringement of its mark, the Complaint was ordered dismissed. The decree of dismissal dated March 26, 1934, after a brief preamble, consists of just one short paragraph: [97]

"Ordered, Adjudged and Decreed that the bill of complaint herein be and the same is hereby dismissed with costs to defendant * * *"

On appeal the Court of Appeals for the Ninth Circuit reversed the judgment. (*California Packing Corp. v. Sun-Maid Raisin Growers*, 1936, 9 Cir., 81 F. 2d 674.) The opinion, in effect, held that Sun-Maid was bound by the contract of March 10, 1917. In a brief paragraph, the Court stated the problem:

"The primary question in the case is whether or not the appellee Sun-Maid Raisin Growers of California, is bound by the contract of March 10, 1917." (P. 676.)

The Court found that the contract was binding and that neither laches nor any other equity consideration stood in the way of enforcing it against Sun-Maid.

Upon the mandate of reversal reaching the Court below, apparently without any objection—and in-

deed with the approval of attorneys for the defendant—under the then Local Rule 44, a final decree was entered on June 15, 1936, granting an injunction as originally prayed for in the Complaint, enjoining Sun-Maid from using the trade-mark Sun-Maid otherwise than

“on packages containing raisins or on packages containing food products or confections made wholly or in part from raisins, provided that such injunction shall not enjoin or restrain defendant from using its present corporate name.”

No further proceedings were had until December 16, 1954, when the defendant filed a motion identical with the present [98] motion to dissolve the injunction. It alleged, in substance, the same facts as are alleged in the present motion, that the plaintiff has abandoned the use of the trade-mark Sun-Kist and that it appears from a deposition of an officer of the plaintiff that they have no interest in continuing the injunction and generally that it would be inequitable to continue to enforce it prospectively. The matter was heard upon documentary evidence and a deposition, by Judge Peirson M. Hall, who, on the 20th day of January, 1956, entered an Order declining to rule on the merits, but directing the dismissal of the motion, for failure to comply with the requirement that a proceeding to affect a final judgment should be addressed, in the first instance, to the Circuit Court of Appeals which had ordered the judgment entered. An appeal from

that Order was taken, and on January 16, 1957, the Court of Appeals dismissed the appeal as not being from a final order. Considering the proceeding before it as a request for permission to proceed in the District Court, they granted it. (*Sun-Maid Raisin Growers of California v. California Packing Corp.*, 1957, 9 Cir., 244 F. 2d 895.)

Before the Court now is the same motion on practically the same grounds with the added ground that the plaintiff has used the trade-mark Sun-Kist monopolistically and that, for that reason, the further enforcement of the injunction would be inequitable.

II.

Alleged Invalidity of Contract as Monopolistic

In dealing with the validity of the contract, it is to [99] be borne in mind that a contract valid at the time it was entered into cannot be invalidated by conditions developing at a later date. (17 C.J.S., Contracts, §210(c).) The decision in this case is based upon a valid contract which stemmed from litigation relating to the Sun-Kist and Sun-Maid trade-marks. The findings as to the absence of confusing similarity between the Sun-Kist and Sun-Maid trade-marks contained in the original findings in the case were not transmuted into the decree finally entered in the case. For that decree was based solely upon the court's conclusion that the defendant's predecessor by contract had assumed the obligation to limit its use of the mark Sun-Maid to

raisins or raisin products only, and that no reason existed, in equity, for relieving it from the obligation. Speaking more specifically of the contention that the contract of March 10, 1917, is monopolistic: The contract did not then, nor does it now create a monopoly in violation of the Sherman Anti-Trust Act. (15 U.S.C.A., §1 et seq.) The present trend of the courts is not to consider control of a commodity in itself as constituting a monopolistic practice which goes counter to the Sherman Anti-Trust Act unless the control of the market is such that the public has no access to competitive commodities. The Supreme Court in *United States v. Du Pont & Co.*, 1956, 351 U.S. 377, 394, stated the problem in this manner:

“When a product is controlled by one interest, without substitutes available in the market, there is monopoly power. * * * But where there are market [100] alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others. If it were not so, only physically identical products would be a part of the market.”

Even when the right to trade is limited, there is no anti-trust violation in an agreement unless it result in an unreasonable restraint. (Restatement, Contracts, §§512-513; *Apex Hosiery Co. v. Leader*, 1940, 310 U.S. 469, 485-486, 497; *Times Picayune Publ. Co. v. United States*, 1953, 345 U.S. 594, 611;

Stearns v. Tinker & Razor, 9 Cir., 1958, 252 F. 2d 589; *Klor's v. Broadway-Hale Stores, Inc.*, 9 Cir., 1958, decided on March 28, 1958. And see the writer's opinion in *Martin v. The Ford Alexander Corporation*, D.C. Cal., 1958, 160 F. Supp. 670, 686-687.)

So, even if the agreement of March 10, 1917, had the effect of preventing Sun-Maid's predecessor, and consequently Sun-Maid, from engaging in the production and marketing of products other than raisins and raisin products, the monopolistic feature would not be a violation of law or public policy without an actual showing that there were no others in the field engaging in the production and sale of products competitive to those of the plaintiff. However, the agreement is much narrower. It does not prevent Sun-Maid from engaging in the production of canned products of fruits and vegetables other than raisin and raisin products. It merely restricts the use of the trade-mark Sun-Maid to such products. Sun-Maid's [101] predecessor was free, and Sun-Maid itself has been free all these years, to can anything—vegetables or fruits—and market them under any name so long as that name is not Sun-Maid. The owner of a trade-mark has a property right which attaches to the mark so long as the mark is used in the conduct of a business, or in the sale of goods. (15 U.S.C.A., §1051; 87 C.J.S., Trade-Marks, §2; *Stork Restaurant v. Sahati*, 9 Cir., 1948, 166 F. 2d 348, 352; *Continental Distilling Sales Co. v. Brancato*, 8 Cir., 1949, 173 F. 2d 296, 298;

Bulova Watch Co. v. Steele, 5 Cir., 1952, 194 F. 2d 567, 569.)

Generally, the owner of a trade-mark may assign or transfer the mark to others for use in conjunction with a business or product, even if a proper name is a part of the mark and the purchaser will be protected. (87 C.J.S., Trade-Marks, §171; Guth v. Guth Chocolate Co., 4 Cir., 1915, 224 Fed 932, 934; Reddy Kilowatt, Inc., v. Mid-Carolina Electric Co-Op., 1957, 4 Cir., 240 F. 2d 282, 289. And see, 15 U.S.C.A., §§1025, 1127.)

In the case before us, the plaintiff, since the issuance of the injunction, has sold its trade-mark Sun-Kist and the good-will attached to it. This sale does not terminate its rights under the contract, so far as Sun-Maid mark is concerned. During the negotiations for the sale of the mark, the existence of the injunction was considered as a part of the good-will which was being transferred. Much is made of the fact that the contract of September 20, 1950, does not transfer the injunction. In a [102] sense, a judgment is a contract. (49 C.J.S., Judgments, §6; Am. Jur., Judgments, §7.) As stated by the Supreme Court in *Blount v. Windley*, 1877, 95 U.S. 173, 176:

“It is undoubtedly true, in some sense and for some purposes, that a judgment has been treated and considered as a contract; and we are not disposed to deny that the judgment in this case is evidence of a contract. But the judgment is only a contract because it is evi-

dence of a debt or obligation on the part of defendant due to plaintiff. The judgment itself presupposes, and is founded on, some antecedent obligation or contract, because it now has the sanction of the judicial determination of its validity and the amount by a court of law. The essential nature and character of the contract remains unchanged.” (Emphasis added.)

And it may well be assumed that, if a judgment granting injunctive relief is assignable, the courts would protect the assignee because the effect of an assignment absolute in form is “to vest the legal title” in the assignee. (*Spiller v. Atchison T. & S.F. Ry. Co.*, 1920, 253 U.S. 117, 134.) But such an assignment is not necessary in order to continue to secure the benefits of the injunction. An assignor at common law had the sole right to protect the assignee, by legal means, in the thing he assigned or in the rights ancillary to it. (6 C.J.S., Assignments, §124.) Now the assignee has such right [103] in his own name, as he is the real party in interest in the thing assigned. (6 C.J.S., Assignments, §125; *California Code of Civil Procedure*, §367; *Lucey Mfg. Corp. v. Morlan*, 9 Cir., 1926, 14 F. 2d 920; *Curtin v. Kowalsky*, 1904, 145 Cal. 431, 434-435; *Cohn v. County Board of Supervisors*, 1956, 135 C.A.(2) 180, 184.) Regardless of any provision in the contract, the plaintiff would be required, should its rights to the injunction be challenged, to defend them insofar as they affect the rights of the assignee. More important than the right to the use of

the trade-mark Sun-Kist is the fact that through the contract Sun-Maid's predecessor bound itself to limiting its use of the Sun-Maid trade-mark to raisins and raisin products. When the plaintiff's predecessor acquired the right not to have the Sun-Maid trade-mark used on other products, it also confirmed Sun-Maid's exclusive right to the use of the mark on raisins and raisin products. Indeed, the preamble to the Agreement states:

“Whereas, the party of the first part desires that its right to use the said trade-mark ‘Sun-Maid’ in connection with the packing and sale of raisins and food products or confections containing raisins shall be established as against said The J. K. Armsby Company, or its successors, or any one claiming through or under them, the right to use said trade-mark ‘Sun-Kist,’ and to that end to procure the dismissal of said suit;” [104]

There is added strength to this position when we consider that the Court of Customs and Patent Appeals, in a contest over the same trade-mark, held that, by reason of the contract, Sun-Maid

“was restricted in its use of its mark ‘Sun-Maid’ and may not assert ownership of the same as applied to the goods described in its pending applications.” (California Packing Corp. vs. Sun-Maid Raisin Growers, 1933, C.C.P.A., 64 F. 2d 370, 376.)

III.

No Showing of Oppressive Effect of Injunction

Factually, the showing made by the affidavits, exhibits and depositions is insufficient to cause us to relieve Sun-Maid of its contractual obligations. A court of equity may, in the light of changed conditions, relieve a person of the effect of an injunction. However, courts will not do so unless the conditions have so altered as "to change the judgment into an instrument of wrong." (*United States vs. Swift & Co.*, 1932, 286 U. S. 106, 115.) In the case just cited, in which the phrase just quoted was used, a leading case on the subject the Court said:

"There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction whether right or wrong, is not subject to impeachment [105] in its application to the conditions that existed in its making. We are not at liberty to reverse under the guise of readjusting. Life is never static, and the passing of a decade has brought changes to the grocery business as it has to every other. The inquiry for us is whether the changes are so important that dangers once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unfore-

seen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." (p. 119.)

The Court of Appeals for the Ninth Circuit has applied this principle in *Morse-Starrett Products Co. vs. Steccone*, 1953, 205 F. 2d 244. The Court, after quoting the language of the *Swift* case, set out above, stated:

"In the instant case there has been no adequate showing either that changed conditions make continuation of the injunction inequitable or that operation of the injunction cannot have the intended effect. See Restatement, Torts, Section 943, comment (e) (1939). The case [106] upon which Mr. Steccone relies for the proposition that such a showing is unnecessary, *Coca-Cola Co. vs. Standard Bottling Co.*, 138 F. 2d 788, does recognize that modification of a decree depends upon a showing of changed circumstances of sufficient importance to warrant such modification." (p. 248.)

Significantly, in Footnote 5 of the opinion (p. 249), Judge Orr adverts to the statement of the Advisory Committee on the Amendments to the Rules, that Rule 60 (b) of the Federal Rules of Civil Procedure does not assume

"to define substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief." (See, 28 U.S.C.A., Rule 60, p. 313.)

(See, *Block vs. Thousandfriend*, 2 Cir., 1948, 170 F. 2d 428, 430; *Elgin Nat. Watch Co. vs. Barrett*, 8 Cir., 1954, 213 F. 2d 776, 780; *Federal Deposit Insurance Corp. vs. Alker*, 3 Cir., 1956, 234 F. 2d 113, 166 and Footnote 4.)

In effect, this means that the rule referred to does not go beyond the principles which have obtained in Courts of Equity for granting relief from judgments. (49 C.J.S., Judgments, § § 341-342; 43 C. J. S., Injunctions, § 237; 28 Am. Jur., Injunctions, § 323. And see, *Drivers Union vs. Meadowmoor Co.*, 1941, 312 U. S. 287, 298; *Cole vs. Fairview Development, Inc.*, 9 Cir., 1955, 226 F. 2d 175.) [107]

IV.

The Compromise as the Basis for the Injunction

It is axiomatic that the settlement of a disputed claim is a good consideration for an agreement to compromises. (1 C.J.S., Accord and Satisfaction, § 4, p. 475.) The decree of the court entered after the reversal of the original decree made no reference to the rights to the Sun-Kist trade-mark. It read:

“It is further Ordered, Adjudged and Decreed that an injunction issue herein perpetually enjoining and restraining the defendant, its agents and servants, and all claiming and holding through or under it, from using the trade-mark ‘Sun-Maid’ otherwise than on packages containing raisins or on packages containing food products or confections made wholly or in part from raisins, provided that such injunction shall not enjoin or restrain defendant from using its present corporate name.”

Significantly, no new findings were made, and as the decree was approved by both sides, it may be assumed that, although the original findings disappeared with the reversal of the judgment in favor of the defendant, counsel for both parties waived new findings. So Sun-Maid cannot, at the present time, recapture the benefit of a finding of non-confusion which the Court of Appeals' decision set aside, and upon such finding base the argument that the plaintiff no longer being interested in the Sun-Kist label, they should be deprived of the benefit of the judgment. [108]

The short answer to this contention is that the injunction merely confirmed rights with which Sun-Maid's predecessor had parted in 1917. In truth, the final injunction issued was based upon one ground only, namely, that Sun-Maid's predecessor by contract had limited itself to using the Sun-Maid trade-mark on raisins and raisin products only. So that, in reality, Sun-Maid is seeking now to be relieved of a contract from which courts repeatedly have declined to relieve them in the past. The present use by plaintiff's assignee of Sunkist rather than Sun-Kist did not terminate the right of the plaintiff to the contract whereby the defendant's predecessor agreed to limit the use of its mark Sun-Maid to raisins and raisin products. The contract of 1917 contemplated that the benefits inure to the assignee of both parties, including the assignee of defendant's predecessor, and its successors, for that matter. The clause already quoted guaranteeing the rights of Sun-Maid indicates this with clarity.

During these years Sun-Maid has had and received great benefits from the exclusive use of the mark on raisins and raisin products. No one has challenged their right to such use. By the same token, the plaintiff, through its predecessor, has acquired the right to have the label confined to such products. Under the guise of modifying the injunction, the defendant, in reality, is seeking to be relieved of the burdens of the contract. The detriments of which they complain flow not from the injunction, but from the contract their predecessor entered into, and by which they are bound. Even if the defendant's predecessor [109] was wrong in settling the lawsuit, the defendant cannot be relieved of the contract by which it limited the use of its own trade-mark Sun-Maid to certain products in order to avoid litigating the possible infringement of the Sun-Kist mark.

The situation is thus akin to that wherein a person agreeing to pay for an idea which is not protected, will be held to his bargain notwithstanding the fact that, before disclosure, he could have used the idea without paying for it. (*Desny vs. Wilder*, 1956, 46 Cal. (2) 715, 730.)

This court, the Court of Customs and Patent Appeals and the Court of Appeals for the Ninth Circuit have held that the contract of 1917 was valid and binding on the defendant, although the defendant at the time is acquired the assets of its predecessor, California Associated Raisin Company, through bankruptcy, did not know of its existence.

In sum, the change of ownership in the trade-

mark Sun-Kist and the acquisition of it and the good will by the Sun-Kist Growers, Inc., does not alter the situation or the rights flowing to the parties from the Agreement of March 10, 1917, and the injunction which limited Sun-Maid's use of the trade-mark to raisins and raisin products only.

Grant that a court of equity may, upon a clear showing of unforeseen and unanticipated conditions, modify an injunction. (United States vs. Swift & Co., 1932, 286 U. S. 106, 119.) Nevertheless, that right does not extend to rights fully accrued upon facts so nearly permanent as to be substantially impervious to it: [110]

“A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. * * * The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change.” (United States vs. Swift & Co., *supra*, at p. 114.)

Here, nothing has happened except a change of ownership of the mark which had formed the basis of the lawsuit which preceded the Agreement of March 10, 1917. To repeat, the injunction merely confirmed it and nothing has been produced at this hearing to indicate that the injunction

“has been turned through changing circumstances into an instrument of wrong.” (United States vs. Swift & Co., *supra*, at p. 115.)

Summary and Conclusion

In summary, it appears that the movant here has based this motion upon grounds that are entirely irrelevant. It insists that, by reason of the fact that the plaintiff has sold the trade-mark Sun-Kist and the buyer uses the form Sun-Kist, the defendant should no longer be bound by the injunction which prohibited it from using the trade-mark Sun-Maid on products other than raisins and raisin products.

The argument is a non sequitur. It presupposes that the original decree was grounded upon the ownership by the plaintiff of the trade-mark Sun-Kist. This was not the case. The original [111] litigation in New York between the parties was based on contentions relating to this mark and its infringement. But the decree in the present case was issued solely because the parties compromised a lawsuit, in which the conflicting claims were doubtful and which the courts found to be binding upon them and the defendant, as their successor, regardless of the merits or demerits of the lawsuit.

So the vacated finding to the effect that there was no confusing similarity between the marks Sun-Maid and Sun-Kist and the alleged subsequent abandonment by the plaintiff of the use of the mark Sun-Kist, for an unhyphenated Sunkist, lose all significance. They are not the type of changed conditions for which relief is granted from the effects of a judgment.

On the contrary, it would be inequitable, at the

present time, when no other conditions exist, to relieve the defendant of the binding effect of its predecessor's contract.¹

Nor would it be fair to substitute a new party-plaintiff, Sun-Kist Growers, Inc., which was not a party to the original litigation, and relitigate a judgment which has been final for over twenty years.

In truth, there is nothing left to litigate.

Hence the following rulings:

1. The Motion to Dissolve the Injunction issued on June 15, 1936, is denied. [112]

2. The Motion to Join Sun-Kist Growers, Inc., as a party is denied.

Formal findings and Order to be prepared by counsel for the plaintiff under Local Rule 7. Costs to the plaintiff.

Dated: July 7, 1958.

/s/ LEON R. YANKWICH,
Chief Judge.

Note to Text

¹There is nothing in *Coca-Cola vs. Standard Bottling Co.*, 10 Cir., 1943, 138 F. 2d 788, relied on by Sun-Maid, which goes contra to this conclusion. There, an injunction had been issued enjoining the defendant from

“selling any product under the names Cherry and Cola, Ayer's Cola, Standard Cola, or any like word, name or names, or words, that are colorable imitations of the trade-mark ‘Coca

Cola'; (f) selling any product other than genuine Coca Cola upon calls of 'coke.' "

Later, the Court held that the Coca Cola Company was not entitled to the exclusive use of the word "cola." In the circumstances, the right to the trade-mark having been limited by court action, the Court found it inequitable to continue an injunction which deprived the defendant of the right to use, on soft drinks, the word "cola" in conjunction with words other than "coca" in the combination "Coca Cola" which was the defendant's trade-mark. This is not the situation here. While the plaintiff has, since the injunction was issued, assigned its trade-mark Sun-Kist, neither it nor its successor in interest has abandoned it. But, even if they had, the defendant is still bound by the contract which its predecessor entered into in 1917 limiting the use of its own trade-mark Sun-Maid to raisins and raisin products, and retaining the exclusive right in that field. In *Morse-Starett Products Co. vs. Steccone*, 9 Cir., 1953, 205 F. 2d 244, 249, and in *The Bowdil Co. vs. Central Mine Equipment Co.*, 8 Cir., 1954, 216 F. 2d 156, 160-161, the scope of *Coca-Coca* [114] *Co. vs. Standard Bottling Co.*, *supra*, is limited as herein indicated. Indeed, in the *Bowdil* case, an Order modifying the original injunction, which was based upon a stipulated agreement, was reversed because the Court of Appeals concluded that the showing that the

"discontinuance by the plaintiff of the making of true diamond-shaped bit, standing alone, was

not a circumstance justifying the modification of the injunction.” (p. 160.) (Emphasis added.)

So, here, the sale of the mark does not end Sun-Maid’s obligations embodied in the contract of settlement which was carried over into the decree.

And we may disregard entirely the fact that it stemmed from the settlement of a lawsuit involving the alleged infringement of the plaintiff’s trademark Sun-Kist. For, if the plaintiff’s predecessor, without possessing any mark of its own, had, for adequate consideration, entered into an agreement with the defendant’s predecessor in which they agreed not to use Sun-Maid on any product other than raisins and raisin products, the contract would be just as effective. And the sale of its business to others would not deprive the plaintiff of the right not to have the defendant use its mark on competitive products. (See, *Hamilton, Brown Shoe Co. vs. Sam B. Wolf Sons Co.*, C.C.P.A., 1930, 39 F. 2d 272, 273-274; *R. M. Hollingshead Corp. vs. Davies-Young Soap Co.*, C.C.P.A., 1941, 121 F. 2d 500, 504, 505.)

We repeat: Sun-Maid may pack and sell, if it wishes to, all the varieties of orange, lemon, grape and other products, [115] as exemplified by the twenty-one exhibits introduced at the hearing, as there is nothing in the contract or in the injunction which prevents it from expanding its activities into packing and selling such products. All it is forbidden to do, as a result of its predecessor’s act, is to use the Sun-Maid label on them.

[Endorsed]: Filed July 8, 1958. [116]

United States District Court for the Southern
District of California, Northern Division

Civil No. C-104-M

CALIFORNIA PACKING CORPORATION, a
Corporation,

Plaintiff,

vs.

SUN-MAID RAISIN GROWERS OF CALI-
FORNIA, a Corporation,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER DENYING MOTION
OF DEFENDANT TO DISSOLVE INJUNC-
TION

Findings of Fact

1. The contract of March 10, 1917, between predecessors in interest of plaintiff and defendant settled litigation of claimed infringement of the "Sun-Kist" trade-mark by the "Sun-Maid" trade-mark, and was based upon mutual concessions as to doubtful claims.

2. Under the contract of March 10, 1917, defendant's predecessor agreed to use the "Sun-Maid" trade-mark only on packages containing raisins or on packages containing food products or confections made wholly or in part from raisins.

3. The final decree herein entered June 15, 1936, pursuant to mandate of the Court of Appeals for

the Ninth Circuit was based upon and enforced the contract of March 10, 1917, and directed that an injunction issue perpetually restraining defendant from using the "Sun-Maid" trade-mark otherwise than on packages containing raisins or on packages containing food products or confections made wholly or in part from raisins.

4. The injunctive decree of June 15, 1936, was not based upon plaintiff's then existing rights of ownership in the "Sun-Kist" trade-mark, but upon plaintiff's rights and defendant's obligations under the contract of March 10, 1917.

5. The validity and effect of the contract of March 10, 1917, which compromised disputed claims, and of the injunctive decree of June 15, 1936, which enforced said contract, do not depend upon ownership by plaintiff of rights in the "Sun-Kist" trade-mark.

6. Plaintiff has not assigned its rights under the contract of March 10, 1917, or under the injunctive decree of June 15, 1936.

7. By agreement dated September 20, 1950, plaintiff [118] sold its rights in the "Sun-Kist" trade-mark to California Fruit Growers Exchange, now Sunkist Growers, Inc.

8. The sale by plaintiff of its rights in the "Sun-Kist" trade-mark did not terminate its rights under the contract of March 10, 1917.

9. There has not been any change in any material circumstance relating to the validity or en-

forceability of the contract of March 10, 1917, or the injunctive decree of June 15, 1936, since entry of said decree.

10. There is no evidence that the contract of March 10, 1917, or the injunctive decree of June 15, 1936, has foreclosed defendant from selling its products or any of them in any market, or that there is any lack of competition in the production and sale of fruit and vegetable products.

11. The effect on defendant of the injunctive decree of June 15, 1936, has not changed since its entry; today as in 1936 the injunction merely enforces the contract of March 10, 1917, and the limited ownership rights of defendant in the "Sun-Maid" trade-mark for use on raisins and raisin products only.

12. Defendant has received and is continuing to receive great benefits from the contract of March 10, 1917, in selling raisins and raisin products under the "Sun-Maid" trade-mark free of claims based upon the "Sun-Kist" trade-mark.

13. It would be inequitable now to relieve defendant of the corresponding burdens of the contract of March 10, 1917, and the injunction of June 15, 1936.

14. Neither Sunkist Growers, Inc., nor its predecessor was a party to the contract of March 10, 1917, or to the proceedings herein which issued in the injunctive decree of June 15, 1936. [119]

Conclusions of Law

1. The contract of March 10, 1917, is not an unreasonable restraint of trade.
2. The contract of March 10, 1917, is valid and enforceable by plaintiff.
3. There is no basis for dissolution of the injunctive decree of June 15, 1936.
4. Sunkist Growers, Inc., is not a necessary or proper party herein.

Order Denying Motion of Defendant
to Dissolve Injunction

In accordance with the foregoing findings of fact and conclusions of law, it is Ordered:

1. The motion of defendant to dissolve the injunction entered on June 15, 1936, is denied.
2. The alternative motion of defendant to join Sunkist Growers, Inc., as a party to the proceedings herein is denied.
3. Plaintiff shall recover its costs incurred herein.

Dated: July 25, 1958.

/s/ LEON R. YANKWICH,
Judge of the United States
District Court.

Receipt of Copy acknowledged.

Lodged July 18, 1958.

[Endorsed]: Filed July 25, 1958.

Entered July 28, 1958. [120]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Sun-Maid Raisin Growers of California, the above-named defendant, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Dismissing Defendant's Motion to Dissolve Injunction entered in this action on July 28, 1958.

Dated: August 5, 1958, San Francisco, California.

BOYKEN, MOHLER & WOOD,

By /s/ GORDON WOOD,

Attorneys for Defendant.

[Endorsed]: Filed August 13, 1958. [121]

In the District Court of the United States, Southern
District of California, Northern Division
No. C-104-M

CALIFORNIA PACKING CORPORATION, a
Corporation,

Plaintiff,

vs.

SUN-MAID RAISIN GROWERS OF CALIFOR-
NIA, a Corporation,

Defendant.

DEPOSITION

Be It Remembered, that on Wednesday, the 12th day of January, 1955, at 10:00 o'clock a.m., pur-

suant to the annexed Notice to Take Despositions Upon Oral Examination, at the offices of Messrs. Boyken, Mohler & Wood, 723 Crocker Building, San Francisco, California, personally appeared before me, H. L. Fly, a notary public in and for the City and County of San Francisco, State of California,

CHARLES GRIFFIN, JR.

a witness called on behalf of the defendant herein.

Messrs. Pillsbury, Madison & Sutro, represented by James Michael, Esquire, appeared as attorneys for the plaintiff; and

Messrs. Boyken, Mohler & Wood, represented by Gordon Wood, Esquire, appeared as attorneys for the defendant.

The said witness having been by me first duly cautioned [1*] and sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated between counsel for the respective parties that the said deposition be reported by H. L. Fly, a duly certified reporter and a disinterested person, and thereafter transcribed by him into typewriting, to be read to or by the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witness shall be

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

reserved by each of the parties, save and except any objections as to the form of the questions propounded.

Mr. Wood: You might let the record show that this deposition is being taken in accordance with Rule 26 of the Federal Rules of Civil Procedure. [2]

CHARLES GRIFFIN, JR.

a witness called on behalf of the defendant herein, being first duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Examination

By Mr. Wood:

Q. Would you state your name and residence, age and occupation?

A. Charles W. Griffin, Jr. Do you want the home address or business address?

Q. Home address.

A. 114 Woodland Way, Piedmont, California. Age, 53.

Q. What is your occupation?

A. Vice president, California Packing Corporation.

Q. Who is the president of your corporation?

A. Mr. Roy G. Lucks.

Q. Are you related to a C. W. Griffin?

A. My father.

Q. Was he an officer of the California Packing Corporation? A. He was.

(Deposition of Charles Griffin, Jr.)

Q. And prior to that time was he connected with the Armsby Corporation—is that the name?

A. No, he and his brother, Mr. Andrew Griffin, were the owners of the Griffin and Skelley Company.

Q. And what relationship is there between the Griffin and Skelley Company and the California Packing Corporation?

A. They were one of the four companies that went together to form the California Packing Corporation in 1916 .

Q. And what were the other companies? [3]

A. California Fruit Cannery Association, Central California Cannery or Canneries—I am not exactly sure—Central California Cannery, I believe it was, and J. K. Armsby Company.

Q. How long have you been with the California Packing Corporation? A. Since 1923.

Q. And how long have you been vice president?

A. Well, I feel a little embarrassed about this, to be perfectly frank, but I think it was 1947. I couldn't tell you exactly. I could get it for you.

Mr. Michael: If you require the accurate date, counsel, we will get it for you.

Mr. Wood: If it seems to be pertinent, we will go into it later.

Q. And prior to 1947 or thereabouts what position did you have with the company?

A. Well, actually I was in the Dry Fruit Buying Department.

Q. Are you familiar with the use by California Packing Corporation of the trade-mark Sunkist?

(Deposition of Charles Griffin, Jr.)

A. I think I am.

Q. By the way, is that name as used by California Packing Corporation hyphenated or is it one word?

A. One word.

Q. Has it ever been hyphenated?

A. Not to my knowledge.

Q. Could you tell me approximately when—may I refer to it as Cal Pac for short?

A. Yes.

Q. Could you tell me when Cal Pac started to use the [4] trade-mark Sunkist?

A. I am sorry; I cannot. I actually don't know.

Q. Had the company used the trade-mark Sunkist for as long as you were associated with the company?

A. Yes.

Q. And when were you first associated with the company?

A. 1923.

Q. Could you tell me on what items the trade-mark was used by the company in the past?

A. Rather extensively in the canned fruit line and in the dried fruit line.

Q. And was it used on raisins?

A. It was.

Q. Is the trade-mark Sunkist presently being used by Cal Pac?

A. No, sir.

Q. When did they stop using that trade-mark?

A. I believe that the correct date is—I think it was 1950.

Mr. Michael: Counsel, I think you have a subpoena duces tecum served on the witness which called for an agreement respecting this matter, and if you care, I will submit it. I have both the original

(Deposition of Charles Griffin, Jr.)

and the photostatic copy of the agreement dated September 20th, 1950, between California Packing Corporation and California Fruit Growers Association, and I think it is the document you are seeking under the subpoena duces tecum.

Mr. Wood: May I take a look at it?

(Mr. Michael hands document to Mr. [5]
Wood.)

Mr. Wood: Do you have the original of this document?

Mr. Michael: I have it here.

Mr. Wood: May I see it?

(Mr. Michael hands document to Mr. Wood.)

Mr. Wood: I didn't intend to get into this right now. I thought just a little later I might have a recess for ten or fifteen minutes so I could study this over if it is agreeable with you.

Mr. Michael: You suit yourself.

Q. (By Mr. Wood): This agreement is dated the 20th of September, 1950. Now, in answer to my previous question——

Would you read the last question?

(Question read.)

The Witness: May I say in answer to your question there that the agreement, as I understand it, was signed in 1950.

Q. (By Mr. Wood): What agreement is this you are referring to?

(Deposition of Charles Griffin, Jr.)

A. The agreement you have there.

Q. Perhaps we had better identify this agreement. Do you have a copy, or would you like to look at the original?

A. I have it.

Q. Would you tell me by whom it is executed?

A. By the California Packing Corporation, by Ralph Brown, the vice president, and by Mr. N. Y. Hollister as secretary; by the California Fruit Growers Exchange, H. A. Lynn—

Q. Are you acquainted with Mr. Lynn?

A. I am not, sir—and as secretary, Paul S. Armstrong. [6]

Q. Now, I am not acquainted with the contents of this agreement yet, but do I understand it to be that Cal Pac discontinued the use of the word “Sun-kist” about the time of the execution of this agreement? Is that correct?

A. Approximately so. There is a provision in the contract that would allow us to use any of the labels, cartons, boxes and so forth that we had in stock, using those Sunkist labels on any crops packed from the 1950 or prior crops—in other words, a provision to allow us to dispose of the stock of labels and boxes, cartons and so forth that we had on hand.

Q. Do you actually know how long it took to dispose of these?

A. I do not, sir.

Q. Could you tell me, Mr. Griffin, that this agreement dated September 20th, 1950, was recorded in the patent office?

(Deposition of Charles Griffin, Jr.)

A. I cannot tell you, sir. I don't know.

Mr. Wood: Well, I really think at this point, if I may, I would like to take a recess for ten or fifteen minutes.

Mr. Michael: That's quite satisfactory.

(Recess taken.)

Mr. Wood: On the record.

Now, as I understand it, this original agreement comprises an authorization by the corporation that Mr. Lynn be authorized to execute this agreement between California Packing Corporation and California Fruit Growers Exchange or Sunkist Growers of California. Is that correct?

Mr. Michael: I think it speaks for itself, counsel. [7]

Mr. Wood: Well, I want the record to show——

Mr. Michael: I will stipulate that attached to the agreement dated September 20th, 1950, are copies of resolutions by the various corporations as certified to by the various secretaries or assistant secretaries showing that the parties who actually executed the document had authority to do so.

Mr. Wood: All right. Thank you.

Q. Now, Mr. Griffin, in this agreement Cal Pac is required to execute certain assignments of the trade-mark registrations on the mark Sunkist. Do you have these assignments with you?

A. I do not, sir.

Mr. Michael: I might say, counsel: As you see,

(Deposition of Charles Griffin, Jr.)

Exhibit B attached to the agreement contains quite a long list of registrations. We didn't feel you were particularly interested in having copies of each of those. If there is any question about whether or not the documents called for were executed at some later time, we can check on that, and I will be glad to stipulate with you as to what the facts are.

Q. (By Mr. Wood): Preliminarily, I would like to know, was there just one main assignment that listed all these registrations listed in Exhibit B or was there an assignment for each registration?

A. I am sorry. I am not familiar with it.

Q. And you are not familiar with whether or not the assignments, if any, were recorded in the patent office?

A. I am not.

Q. Who would know?

A. Probably the secretary of the [8] corporation down there would know.

Q. The secretary of the corporation?

A. Yes.

Q. And who is the secretary?

A. At the present time Mr. Croce.

Mr. Michael: Off the record, counsel.

(Unreported discussion.)

Mr. Wood: On the record.

Q. Now, Mr. Griffin, this agreement specifies a certain consideration of money payable by Exchange—that is, the California Fruit Growers Exchange. Could you tell me whether or not that consideration has been paid?

(Deposition of Charles Griffin, Jr.)

A. To the best of my knowledge it has been completely paid.

Q. Now, also in the agreement Cal Pac, as I understand it, is permitted or may be permitted—the agreement may be construed so as to permit Cal Pac to continue to use a trade-mark which includes the word “Sun.” To the best of your knowledge is Cal Pac employing a trade-mark at this time which includes the word “Sun”?

Mr. Michael: May I make an objection to the form of the question? I think it assumes construction of the agreement that may or may not be correct. Assuming what you say is correct and that that construction is a proper construction of the agreement——

Mr. Wood: Let’s rephrase my question.

Q. To the best of your knowledge does Cal Pac employ the word “Sun” in any trade-mark presently used by Cal Pac? [9]

A. Not to my knowledge.

Q. What are some of your trade-marks presently being used? A. Del Monte.

Q. Are there any others for canned goods, for example?

A. Gold bar, Today’s. Those are the major ones.

Q. Prior to this agreement of 1950—the 20th of September, 1950—would you say that Sunkist was a major trade-mark of Cal Pac? A. I would.

Q. On what items was it being used at that time?

A. On a large portion of the canned goods line

(Deposition of Charles Griffin, Jr.)

and at various times on almost a complete line of the dried fruits.

Q. Was it being used on raisins at that time?

A. It was.

Q. Could you give me, just roughly, percentage-wise or by proportion just roughly, the ratio between your gross sales attributable to the Sunkist trade-mark and the Del Monte trade-mark?

A. No, frankly, I couldn't.

Q. Well, would it be in the order of one to ten or one to a hundred or one to two?

Mr. Michael: I object if you are asking the witness to speculate on it. He has testified he couldn't tell you what proportion of the business was sold under the Sunkist brand.

Q. (By Mr. Wood): You mentioned the fact that the Del Monte trade-mark was a major trade-mark. Would you consider the Sunkist trade-mark a major or minor trade-mark prior to September 20th, 1950?

A. I would have to answer that as minor.

Q. Now, you stated before that Cal Pac is not employing [10] the trade-mark Sunkist at the present time?

A. That is correct.

Q. And is it correct that after September 20th, 1950, your only use of the trade-mark Sunkist was for the purpose of using up certain labels for packages that you may have had as permitted by this agreement?

A. Correct.

Q. Are you acquainted with an agreement executed by the California Associated Raisin Com-

(Deposition of Charles Griffin, Jr.)

pany, Griffin and Skelley Company, California Fruit Canners Association, dated March 10th, 1917?

A. I am not, sir.

Q. Are you acquainted with the trial of this original case, California Packing Corporation versus Sun-Maid Raisin Growers of California?

A. I am not, sir.

Q. Who in your organization would be best qualified to testify on this agreement I mentioned—I am sorry, I shouldn't say that you testified. You didn't know anything about it. But who in your organization would be best qualified to testify on the case of California Packing Corporation versus Sun-Maid Raisin Growers of California?

The Witness: Off the record.

(Unreported discussion.)

Mr. Wood: On the record.

The date of the trial was a short time prior to 1936.

Mr. Michael: If you don't know, you don't know. Don't try to guess as to who might have some knowledge about the trial.

The Witness: Frankly, I just don't know. [11]

Q. (By Mr. Wood): How about this secretary you mentioned; what was his name?

A. Croce.

Q. And how long had he been secretary?

A. I believe it was about four years.

Q. Who was secretary prior to him?

A. Mr. Hollister. Mr. Hollister is dead.

(Deposition of Charles Griffin, Jr.)

Q. Getting back again to the use of the Sunkist trade-mark prior to the Sunkist agreement, was your use of the trade-mark domestic; in other words, were products sold in the United States bearing the trade-mark Sunkist?

A. They were.

Q. Were they sold in foreign commerce, too?

A. They were.

Q. Was the foreign commerce involving the trade-mark Sunkist a large percentage or small percentage of the total use?

A. I couldn't answer that. I don't know.

Q. Who would be familiar with that?

A. Well, I assume that possibly that could be obtained from Mr. Croce.

Q. Prior to his assuming the office of secretary, what position did he have with the company?

A. He was with our Tax Department.

Mr. Wood: By the way, if I haven't done so, I want to introduce in evidence this copy of the agreement of September 20th, 1950; and it has been stipulated that a photostatic copy of the same may be employed and that said copy is an exact copy of the original agreement?

Mr. Michael: I will so stipulate. [12]

When you say you want to introduce it in evidence, what you mean, you want to have it marked and that you intend to offer it.

Mr. Wood: I want to offer it in evidence as our Exhibit 1.

Mr. Michael: I take it we have the usual stipu-

(Deposition of Charles Griffin, Jr.)

lations as to the objections, and so forth. Therefore it is not necessary for me to note my objection to the offer at this time.

Mr. Wood: You may object or not as you wish.

Mr. Michael: Well, if we do not have such a stipulation, I will object to the offer of the document at this time on the ground that it is incompetent, irrelevant and immaterial as far as the issues in this proceeding are concerned.

Mr. Wood: Isn't it true, counsel, we have stipulated that the photostatic copy which you have is a true copy of the original agreement?

Mr. Michael: I am perfectly willing to stipulate that the photostatic copy is a true and correct copy of the original, and it may be reproduced and copies attached to the deposition, and any one of the photostatic copies may be used in the same manner that the original may be used at the hearing.

(Agreement above referred to marked Defendant's Exhibit No. 1.)

Mr. Wood: Counsel, are you going to be able to leave us another copy of this agreement? The reporter is going to take this one. I am going to give you back the original.

Mr. Michael: This is a negative copy, and the reporter [13] can have positive copies made and attach copies to the copies of the deposition.

Mr. Wood: How long would it take, Mr. Reporter, to get this back?

(Deposition of Charles Griffin, Jr.)

The Reporter: One day.

Q. (By Mr. Wood): Mr. Griffin, we are interested in getting some information on the extent of use by your company of the trade-mark Sunkist prior to the Sunkist agreement, and as you have testified you are not too familiar with the exact use, and as I understand your testimony, Mr. Croce would probably be familiar with such use?

A. I would assume.

Mr. Wood: I am wondering if Mr. Croce would be available to testify today.

The Witness: I doubt that now. He has been away; he handled some of these tax matters for us, and whether he is there or not I haven't the slightest idea.

Mr. Wood: I am wondering, counsel, whether you could agree to produce Mr. Croce within the next few days?

Mr. Michael: I am not prepared to enter into any stipulation right at the moment to produce any witness, counsel; and I don't say that for any reason of trying to harass or delay your preparation of your case here, but I simply don't know what the availability of these people is. If you are only interested in getting the statistics as to the use of the trade-mark, it seems to me you might approach that by a simpler avenue. You tell me what you want and I will get it for you. [14]

Mr. Wood: That sounds all right, and if it appears it would be better to have the testimony of someone who knows the situation, then we can go

(Deposition of Charles Griffin, Jr.)

through the same thing again and get it. It just seemed to me that if Mr. Croce were available today we would like to have him here. We would naturally like figures on the amount of goods sold under the Sunkist trade-mark prior to the agreement of 1950.

Mr. Michael: In terms of percentage of the business of Cal Pac?

Mr. Wood: I think probably in terms of percentage and also in terms maybe of the gross amount of sales.

Mr. Michael: I am not sure that we will be willing to give you the latter. We might be willing to give you the former; but let me explore the matter and I will let you know.

Mr. Wood: That's agreeable.

Mr. Michael: You are interested in what was in existence prior to the execution of this agreement?

Mr. Wood: Let's say five or ten years prior to the execution of the agreement, and I take it Mr. Croce could testify to that, despite the fact he has only been secretary for only five years.

Mr. Michael: I am not even sure if he is the witness that would have that information. I am not saying this critically of Mr. Griffin. He may be assuming that Mr. Croce, because he is secretary and has charge of the records, would be able to locate it. [15]

The Witness: He would have to dig up the information, but it's a question of who would present it. That's the reason I said Mr. Croce.

(Deposition of Charles Griffin, Jr.)

Mr. Michael: Do you want all this on the record?

Mr. Wood: Yes. We might go off the record now, if we may.

(Unreported discussion.)

Mr. Wood: On the record.

I think that is about all, and I certainly appreciate your coming up, Mr. Griffin.

/s/ CHARLES W. GRIFFIN, JR.

United States of America,
Northern District of California,
City and County of San Francisco—ss.

I hereby certify that on the 12th day of January, 1955, at 10:00 o'clock a.m., before me, H. L. Fly, a notary public in and for the City and County of San Francisco, State of California, at the offices of Messrs. Boyken, Mohler & Wood, 723 Crocker Building, San Francisco, California, personally appeared, pursuant to the annexed Notice to Take Depositions Upon Oral Examination, Charles Griffin, Jr., a witness called on behalf of the defendant herein; and Messrs. Pillsbury, Madison & Sutro, represented by James Michael, Esquire, appeared as attorneys for the plaintiff; and Messrs. Boyken, Mohler & Wood, represented by Gordon Wood, Esquire, appeared as attorneys for the defendant:

and the said Charles Griffin, Jr., being by me first duly cautioned and sworn to testify the whole truth, and nothing but the truth, and being carefully examined, deposed and said as appears by his deposition hereto annexed.

And I further certify that the said deposition was then and there recorded by me, a duly certified and disinterested shorthand reporter, and was transcribed by me.

And I further certify that at the conclusion of the taking of said deposition, and when the testimony of said witness was fully transcribed, said deposition was submitted to and read by said witness and thereupon signed by him; and that the deposition is a true record of the testimony given by said witness.

And I further certify that the exhibit hereto attached and [17] marked Defendant's Exhibit No. 1 is the exhibit referred to and used in connection with the deposition of said witness.

And I further certify that the said deposition has been retained by me for the purpose of securely sealing it in an envelope and directing the same to the Clerk of the Court as required by law.

And I further certify that I am not of counsel or attorney for either or any of the parties; nor am I interested in the event of the cause; I further certify that I am not a relative or employee of or attorney for counsel for either or any of the parties,

nor a relative or employee of such attorney or counsel, nor financially interested in the action.

In Testimony Whereof, I have hereunto set my hand and official seal at the City and County of San Francisco, State of California, this 3rd day of February, A.D. 1955.

[Seal] /s/ H. L. FLY,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires Oct. 13, 1956.

California Packing Corporation
215 Fremont Street
San Francisco 19

Cable Address Calfruit

Calpack Code

February 3, 1955.

Mr. H. L. Fly,
Hart & Hart,
Chancery Building,
564 Market Street,
San Francisco, Calif.

Dear Mr. Fly:

This refers to the question on Line 25, Page 9, of my Deposition of January 12, 1955, reading, "To the best of your knowledge does Cal Pac employ the word 'sun' in any trade-mark presently used by Cal Pack?"

My answer to this question appears on Page 10, and reads, "Not to my knowledge."

Your reporting of my reply was correct; however, I do wish to change this answer to read, "Yes." Investigation upon my return to the office indicates that we do use the brand Sunshine.

Yours very truly,

CALIFORNIA PACKING
CORPORATION,

/s/ CHARLES W. GRIFFIN, JR.,
Vice President.

CWG,Jr./vf.

cc: Mr. James Michael,
Pillsbury, Madison & Sutro,
225 Bush Street,
San Francisco, Calif.

cc: Mr. Gordon Wood,
Boyken, Mohler & Wood,
723 Crocker Building,
San Francisco, Calif.

[Printers Note: Reference to correction in the above letter may be found on page 122 of this printed record.]

[Endorsed]: Filed February 3, 1955.

[Title of District Court and Cause.]

DEPOSITION

Deposition of F. R. Wilcox, called as a witness on behalf of the defendant, taken on Thursday, June 6, 1957, at 2:00 p.m., at 707 West Fifth Street, Los Angeles, California, pursuant to Notice, before Byron Oyler, a Notary Public in and for the County of Los Angeles, State of California.

Appearances:

For the Plaintiff:

PILLSBURY, MADISON & SUTRO, by
GEORGE A. SEARS, ESQ.

For the Defendant:

BOYKEN, MOHLER & WOOD, by
GORDON WOOD, ESQ.

For Sunkist Growers:

LEONARD S. LYON, ESQ.,
KNOX FARRAND, ESQ., and
M. J. McDONALD, ESQ.

Also Present:

MR. GRAINGER,

Mr. Wood: May we have the usual stipulation about the execution of the deposition and the matter of objections?

Mr. Sears: I am agreeable to the ordinary stipulation about the reservation of all objections except as to the form of the question, but at this time I would prefer not to enter into a stipulation as to the waiver of signature.

Mr. Wood: You mean you would prefer to have it signed before any notary?

Mr. Sears: Yes.

Mr. Wood: I think it might be well for the record to mention who is present. I am representing Sun-Maid. I understand Mr. Farrand is representing Sunkist Growers. Mr. Sears represents the California Packing Corporation. Mr. McDonald represents Sunkist Growers. Mr. Lyon, I assume, is representing Sunkist Growers also. Is that right?

Mr. Lyon: That is correct.

Mr. Wood: Are you also representing the California Packing Corporation?

Mr. Lyon: No.

Mr. Wood: You are not representing them in this proceeding?

Mr. Lyon: Not in this case nor at this deposition.

Mr. Wood: Have you ever represented the California Packing Corporation?

Mr. Lyon: Not in connection with this matter. The [2*] original case, which I understand was tried before Judge McCormick and went to the Court of Appeals, I was not involved in that case.

Mr. Wood: Have you been involved in any other cases concerning the California Packing Corporation?

Mr. Lyon: I have represented the California Packing Corporation in various other matters at different times.

Mr. Wood: Very well.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

F. R. WILCOX

called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wood:

Q. Would you state your name, address and occupation, please?

A. F. R. Wilcox; general manager of Sunkist Growers, Inc.; 707 West Fifth Street, Los Angeles, California.

Q. How long have you occupied the position of general manager?

A. Since January 1, 1957.

Q. What was your capacity prior to that time?

A. I was assistant general manager and treasurer.

Q. How long did you occupy that position?

A. As assistant general manager for about 17 years and as treasurer for one year prior to that, but during the 17-year period I held both positions. [3]

Q. Were you with the organization prior to that time? A. Just for a short period.

Q. Then you are acquainted with the change of name to Sunkist Growers, Inc. What was the name of the company before that time?

A. California Fruit Growers Exchange.

Q. Mr. Wilcox, we served a subpoena on you requesting that you bring certain agreements. Do you have them with you? A. Yes, I do.

Q. May I see them? A. Yes.

(Deposition of F. R. Wilcox.)

Mr. Sears: When it is convenient, Mr. Wood, may I look at the file also?

Mr. Wood: Yes. I want to see if it is a duplication of what we already have.

Mr. Sears: Fine.

Mr. Wood: I would like to have all of these papers marked collectively as Exhibit 1. We intend to offer them into evidence. It happens that they are identical to Exhibit 1 in the deposition of Charles Griffin, Jr.

Mr. Lyon: May we substitute in this deposition, if you are going to want the documents produced by the witness, an uncertified copy?

Mr. Wood: That is satisfactory. Do you mean rather [4] than the originals——

Mr. Lyon: Those are the originals, Mr. Wood. If you don't need the originals we would like to substitute copies.

Mr. Wood: That is satisfactory.

Mr. Sears: Off the record. * * *

Mr. Wood: When was the change made?

Mr. Farrand: I think it was 1952.

The Witness: Is the year sufficient? I don't know the exact date, but the year was 1952.

Mr. Farrand: I don't have the year either.

Mr. Wood: That was the year the name was changed to Sunkist Growers, Inc.?

The Witness: Yes.

Mr. Wood: Suppose we mark the certified copy Exhibit 1?

Mr. Lyon: It is an uncertified copy.

(Deposition of F. R. Wilcox.)

Mr. Wood: I thought you made some certification regarding it.

Mr. Lyon: No, but I have read it.

Mr. Wood: If you say it is a copy that is good enough for me, Mr. Lyon. Will you mark it Exhibit 1?

(Whereupon the documents above referred to were marked as one exhibit, Defendant's Exhibit 1.)

Q. (By Mr. Wood): Mr. Wilcox, with reference to exhibit 1, and specifically to the agreement of September 20, 1950, [5] I would like to get some background on that agreement which purports to assign the Sunkist trade-mark.

Can you tell us why Sunkist Growers, Inc., wanted to purchase that mark?

A. Yes. It was primarily for the purpose of obtaining rights so that we could use it on canned citrus products, including frozen products and single strength juice.

Q. Just prior to the assignment of 1950 on what products was the Sunkist trade-mark used by Calpack? I refer to the California Packing Corporation as Calpack.

A. I don't have the exact knowledge, but we understood at the time that they were using it on a general line of canned goods, primarily in the deciduous fruit and in the vegetable field.

Q. Did you know at the time just prior to the execution of the agreement of 1950 how much goods

(Deposition of F. R. Wilcox.)

were sold by the California Packing Corporation under the Sunkist trade-mark? A. No.

Q. Were you involved in the negotiations that culminated in the agreement of 1950?

A. Yes.

Q. During these negotiations the actual extent of the use of the mark by California Packing Corporation was not brought to your attention. Is that right? [6] A. That is right.

Q. Do you know of any specific uses by Calpack of the Sunkist trade-mark during the period just prior to the agreement of 1950?

A. Yes. We knew of sales offices in some markets which I can't recall at this particular time where Sunkist was being used on some canned merchandise.

Q. During these negotiations of which I am speaking you did not know of any specific use, however. Is that right? A. No.

Q. At a time just prior to the execution of the agreement of 1950, would you be prepared to state in dollar value the amount of sales by Sunkist Growers annually?

A. On fresh fruit at that time it was running something in excess of \$100,000,000 annually. That varies considerably as the crops vary. We had years when it exceeded \$150,000,000 f.o.b.

In addition to that there were sales of products made by our products department which varied all the way from \$20,000,000 to as much as \$40,000,000 annually.

(Deposition of F. R. Wilcox.)

Q. Referring to the sale of goods at the time just prior to the agreement, were all of these goods sold under the Sunkist trade-mark?

A. No.

Q. For example, what goods would not be sold under [7] the Sunkist trade-mark?

A. Second-grade fresh fruit was sold under other trade-marks. We have a second trade-mark which was used rather extensively—it is used less extensively now—called Red Ball. Then there are house brands that carry second and third grades of fruit in which Sunkist is not used. None of our products were sold under the Sunkist brand.

Q. What would be examples of some products?

A. Single strength juice in cans, grapefruit juice, orange juice was sold under the exchange brand.

Q. Are you in a position to give us the dollar values of goods sold by Sunkist Growers not under the Sunkist trade-mark at that time?

A. Not exactly, but I could give you some rough estimates if that would suffice.

Q. Would you do that?

A. That, of course, would include all of the products which I previously indicated, none of which were sold under the Sunkist label. In an average year approximately 30 to 35 per cent of our fresh fruit was sold under non-Sunkist simply because it does not meet the Sunkist grade specifications.

Q. I take it the Sunkist mark is the high quality

(Deposition of F. R. Wilcox.)

mark. Is that right? A. That is correct. [8]

Q. Just prior to the agreement of 1950 did you have any figures on the amount of sales by California Packing Corporation under the Del Monte trade-mark? A. No, sir.

Q. As I understand your previous testimony you had no figures on sales by Calpack under the Sun-kist trade-mark? A. No, sir.

Mr. Lyon: Are you asking the witness for his personal knowledge?

Mr. Wood: That is what I want, yes.

Mr. Lyon: Because those figures have been published in lawsuits in which the California Fruit Growers Exchange was a party to.

Mr. Wood: I realize that.

Q. Are you prepared to tell us how the figure of \$1,250,000 was arrived at, that being the figure paid by Sunkist Growers to Calpack for the assignment of the Sunkist trade-marks?

A. Yes. It was a negotiated figure, of course, arrived at after negotiations between California Packing Corporation officials and ourselves, based upon what the California Packing Corporation felt were rights and interests in the trade-mark due to expenditures that they had made over a period of years and rights that they were giving up, and on the other hand our evaluation was based somewhat upon [9] what we felt the extended use in value of the trade-mark to us would be, particularly on citrus products. So I would say it was a negotiated figure that was arrived at.

(Deposition of F. R. Wilcox.)

Q. Would you say it was correct that on the one hand you had a certain figure representing expenses that Calpack had gone to in the development and promotion of the Sunkist trade-mark, and on the other hand a figure representing in some way the value of the mark to you?

A. Yes. I would say about as I outlined before, that we negotiated an amount.

Q. Was there ever a larger figure proposed by Calpack?

A. Yes. As I recall it was larger than that, but I don't recall the amount.

Q. How long did the negotiations take place which culminated in the agreement of 1950? I mean how long did they extend? Over what period of time did they extend?

A. I would have to guess at that, but I would say that it certainly extended over a period of more than one year.

Q. Do you remember the initial steps in connection with these negotiations? In other words, who approached whom on this matter initially, do you remember?

A. As I recall after consultation with counsel, and so forth, we approached Calpack on the matter.

Q. What individual in Calpack's organization was [10] approached?

A. As I recall it was Mr. Pratt. He was one of the individuals.

Q. At that time prior to the commencement of the negotiations and during the negotiations what attorneys represented the parties?

(Deposition of F. R. Wilcox.)

A. I don't know who represented Calpack, but representing us in our discussions were Mr. Far-
rand, Sr., who is now deceased and Mr. Lyon who
is present this afternoon.

Q. I believe you stated you did not know the
actual sales figures applicable to the Sunkist mark
as used by Calpack. However, at the time of the
negotiations did you know that the use of the Sun-
kist trade-mark by Calpack was diminishing each
year annually between 1947 and 1950?

A. No. I had no personal knowledge.

Q. You had no knowledge then of the actual ex-
tent of use by Calpack. Is that right?

Mr. Sears: Are you representing that to be
exact?

Mr. Wood: I am putting the question in that
form. I want to make that point clear.

Q. Did you have any knowledge of the extent of
the use of the mark by Calpack being the negotia-
tions?

A. No, I did not.

Q. Again as I understand it you were the nego-
tiating party for Sunkist Growers? [11]

A. No. Mr. Armstrong, who was then general
manager, was the prime negotiating party. I
assisted him.

Q. Could it be fairly said that you had knowl-
edge of all the proceedings at that time during the
negotiations? A. Yes.

Q. Did you bring with you any specimens of
the Sunkist labels? A. Yes.

(Deposition of F. R. Wilcox.)

Q. May I look at them?

A. I think you requested labels and advertising. Here are six specimens of Sunkist labels which we are presently using on some of our citrus products.

Q. Now do you have any advertising with you?

A. Yes.

Mr. Wood: May I take a little time to thumb through these?

(Short recess at this point.)

Q. (By Mr. Wood): Mr. Wilcox, these specimens of advertising and labels are so colorful that I think it would be a shame to reproduce them in black and white. I wonder if we could prevail upon you to provide sufficient copies of each so that they may be attached to copies of the deposition?

A. I think so. How many do you require?

Q. Perhaps four, unless Mr. Lyon also wants a copy. I was going to ask the reporter to mark all of these. [12]

A. I am sure we can furnish four of most of them.

Q. May we do that? A. Certainly.

Mr. McDonald: How many in all do you wish?

Mr. Wood: Four in all.

Mr. McDonald: Do you want the cans?

Mr. Wood: No, just the flat material. * * * Mr. Reporter, would you mark the advertising samples consecutively beginning with number two and attach them as exhibits, with the understanding that

(Deposition of F. R. Wilcox.)

additional originals are to be furnished by Mr. McDonald?

(Whereupon the advertisements above referred to were marked Defendant's Exhibits 2 to 22, inclusive.)

Q. (By Mr. Wood): The agreement of 1950 provides in part that Calpack turn over to you specimens of all the labels used by Calpack incorporating the Sunkist trade-mark. Do you have specimens of these labels?

A. I am sure we have those. They were turned over and I am sure we still have them.

Q. You don't have them available now?

A. No, I don't. I don't think they were requested. Were they?

Q. No, they were not.

A. Those would be in Mr. McDonald's files.

Mr. Lyon: He keeps his files in Ontario.

Mr. Wood: Would it be agreeable to provide me with [13] one copy each of the specimens of the specimens supplied by Calpack pursuant to the agreement of 1950?

Mr. McDonald: I think we can supply you with one of a representative number. There are quite a few, but some of them are quite limited in supply. We can give you a representative cross-section of those.

Mr. Wood: I would appreciate that.

Mr. McDonald: Where do you want those delivered? Do you want them along with the others?

(Deposition of F. R. Wilcox.)

Mr. Wood: No. I don't want them as exhibits. I would like to see them myself.

Mr. McDonald: Do you want one set of those?

Mr. Wood: One set would be satisfactory.

Q. Mr. Wilcox, since the agreement of 1950 has Sunkist Growers, Inc., filed any applications for registration of any trade-mark?

A. Yes, for Sunkist trade-marks.

Q. On what goods, do you know?

A. We have filed on a number of products including those represented by these cans which you have requested, and they include products in oranges, lemons and also some on grapefruit. They are primarily in the field of single strength juice for the various varieties of citrus, frozen concentrates and some blends.

Q. Would it be fair to say that the Sunkist mark, as used by Sunkist Growers, is represented by the specimens [14] marked number two and the succeeding ones which you have provided as specimens of labels and advertising? In other words, does the showing of the Sunkist trade-mark on these specimens fairly represent the use of the Sunkist trade-mark by Sunkist Growers, Inc.?

A. Yes, but I would say it is not intended to be all inclusive.

Q. In that connection are there any variations made in the use of the mark over the specimens which we have here marked as Exhibits 2 and the successive exhibits?

A. As to the form?

Q. As to the form of the mark?

(Deposition of F. R. Wilcox.)

A. No. It is used in that form in all of our advertising.

Q. In all of your labels, is that correct?

A. Yes.

Q. During the negotiations leading to the agreement of 1950 were you acquainted of your own knowledge with a decision of the Court of Appeals in Illinois in connection with the Sunkist Packing Company lawsuit?

A. I am not familiar enough with it to discuss it, but of course I know of the case.

Q. Did that particular decision come up in connection with the negotiations leading toward the assignment of the Sunkist mark?

A. Not to my recollection. [15]

Q. Do you remember the litigation in Illinois involving the Sunkist Packing Company?

A. Yes, I have a recollection of it.

Q. Do you remember who paid the bills in connection with that litigation?

A. No, I don't. Our records would show, but I do not remember offhand.

Q. During this period I think you said perhaps a year when the agreement leading to the sale of the Sunkist mark was negotiated, were there any other alternative types of agreements discussed by you or Mr. Armstrong with representatives of Cal-pack?

A. Not to my recollection.

Q. Would it be fair to state that the agreement of 1950 was substantially the same when executed,

(Deposition of F. R. Wilcox.)

as far as form is concerned, as it was when negotiations commenced?

A. With the usual developments which occurred during that time and the advice of counsel.

Q. Could you tell us the policy of Sunkist Growers, Inc., relative to the renewal of the registrations that were assigned by the assignment of 1950? Have you renewed any of these registrations?

A. I am not sure.

Q. The matter of registrations, I take it, are more in the domain of Mr. McDonald?

A. Yes. He handles all of the details of that. [16]

Q. Does Sunkist Growers, Inc., sell pineapple juice? A. No.

Q. Grape juice? A. No.

Q. Further in connection with the agreement of 1950 were there any secret promises made by California Packing Corporation in consideration for the \$1,250,000? A. Not to my knowledge.

Q. Then it would be fair to state that any promises made by California Packing Corporation were in writing in the agreement of 1950. Is that right? A. As far as I know, yes.

Q. The agreement of 1950 provides in part that Calpack would deliver up to Exchange, which I understand is now Sunkist Growers, "50 copies of each and every available carton, box, label, circular, advertisement, sign, billhead, letterhead and slogan on which appears the trade-mark 'Sun-Kist' or the word 'Kist' or any combination thereof, or any il-

(Deposition of F. R. Wilcox.)

illustration having such implication, or any representation, in part or in whole, of a sunburst.”

Were these 50 copies each of these specimens actually delivered to Sunkist Growers?

A. As far as I am aware, the contract was lived up to in that respect, yes, sir.

Mr. Wood: In connection with our prior discussion I [17] take it you will be able to provide me with one each of these specimens of the ones that were obtained from Calpack?

Mr. McDonald: Of a representative group. In some instances there were less than 50.

Mr. Wood: If there is a lot of duplication and one is representative of a group of different labels, perhaps on different canned goods, one would be enough, if you would say the label was used on certain other goods.

Mr. McDonald: It gets complicated when you run into various size cans. For instance, there may be sliced peaches, whole or halves.

Mr. Wood: We would want only one of such a group.

The Witness: We are clear on that, do you understand what you want?

Mr. Wood: I don't think we will have a problem there. I am sure we can get what we are after. If we don't we will let you know.

The Witness: Does Mr. Grainger want a copy of each of those?

Mr. Grainger: No, I don't need them.

The Witness: You don't want them?

(Deposition of F. R. Wilcox.)

Mr. Grainger: No.

Q. (By Mr. Wood): Referring again to the agreement of 1950, briefly it provides that Calpack will deliver to Exchange certain letters, correspondence, documents and agreements and the like relative to controversies and [18] proceedings with others respecting the use of the Sunkist mark.

Were these materials delivered to Sunkist Growers, Inc.?

A. Yes; so far as I am aware they were delivered.

Q. Referring to that portion of the agreement of 1950, Paragraph 7, it provides that each party will discharge and release the other of any claim or liability arising out of the agreement of October 7, 1915.

In connection with this paragraph had California Packing Corporation prior to 1950 threatened to bring suit against Exchange in connection with the Sunkist trade-mark?

Mr. Lyon: That is also subsequent to the agreement of 1915.

Mr. Wood: I am saying prior to 1950. What is your question?

Mr. Lyon: Subsequent to 1915, subsequent to the agreement of 1915. The agreement of 1915 recites a prior suit by a predecessor of Calpack against Exchange.

Mr. Wood: I had in mind the period between 1915 and 1950.

Q. During the period between 1915 and 1950

(Deposition of F. R. Wilcox.)

had California Packing Corporation threatened in any way to file suit against Sunkist Growers, Inc., or its predecessor? A. Not to my knowledge.

Q. This agreement also provides for a consideration [19] of \$1,250,000 payable to California Packing Corporation. Has this total amount been paid?

A. Yes, in full.

Q. During the negotiations preceding the agreement of 1950 did California Packing Corporation at any time make any representations as to the amount of money invested by it in the Sunkist trade-mark? A. Not to my knowledge.

Q. With respect to the question of filing and prosecuting applications for trade-mark registration or renewing registrations who in management would be responsible for that decision or for decisions involving such matters?

A. The recommendations are made by Mr. McDonald and general management which means myself at the present time—they would have the final decision.

Q. Were you consulted with respect to the applications for registration filed by Sunkist since 1950?

A. Either Mr. Armstrong or myself were consulted, yes.

Q. What is Mr. Armstrong's capacity now?

A. He is retired now, sir.

Q. When did he retire?

A. December 31, 1956.

Q. Is there anyone else in management besides

(Deposition of F. R. Wilcox.)

yourself who would pass upon applications for renewing registrations? [20]

A. Yes. In my absence it would be the assistant general manager, Mr. Don Anderson, D. M. Anderson. In the normal re-registration it is entirely up to Mr. McDonald. That is just a proper procedure to follow.

Q. You don't know of any particular instance since 1950 where you passed on the advisability of filing, prosecuting or renewing an application for registration?

A. I can't think of a specific instance, but I am sure that they have been discussed over that period of time, particularly in some of the foreign countries. I can think of one in Australia and New Zealand where registration and re-registration has been made. Of course during that period of time we have registered for our products all of which has been done since this agreement of 1950.

Q. I think you testified to this before, but I don't remember exactly what you said. When you say products that means what?

A. That means products made from citrus fruits including juices, concentrates, frozen and pasteurized.

Q. Products as distinguished from fresh fruits?

A. Yes.

Q. I was a little dense about that. I am sorry.

A. We use it as a common phrase term to distinguish it from the sale of fresh oranges, lemons and grapefruit.

(Deposition of F. R. Wilcox.)

Mr. Wood: That is all the questions I have, but I would like to suggest a five- or ten-minute recess. [21]

(Short recess at this point.)

Cross-Examination

By Mr. Sears:

Q. Mr. Wilcox, in 1950 at the time of the negotiation of the agreement which we have been discussing this afternoon did you know of the injunction which Calpack had against Sun-Maid Raisin Growers restricting its use of the Sun-Maid mark to raisins and raisin products?

A. Yes. During the negotiations that was brought out, that there was such a document.

Q. Did Sunkist Growers consider the existence of this injunction in connection with the purchase of the rights acquired by the 1950 agreement?

A. I would say it would be a part of the whole good will program of the trade mark and in purchasing the rights of Calpack to the trade-mark included the good will, and that was a part of it, yes, sir.

Q. In connection with the rights acquired by Sunkist in the 1950 agreement does Sunkist Growers consider the form in which Calpack used the Sunkist mark and the form in which Sunkist Growers uses the Sunkist mark as equivalents?

A. Yes. I would say definitely so. With respect to the amount of usage we recognize that Sunkist

(Deposition of F. R. Wilcox.)

used it to a greater extent, but within the limits of its use my answer to your question would be yes. [22]

Q. Since the acquisition of the rights under the 1950 agreement has Sunkist Growers increased and expanded its use of the Sunkist mark?

A. Oh, yes.

Q. That increased use of the Sunkist mark has been on what products?

A. It has been on what we call or normally classify as citrus products which includes a large range of products that are normally made from citrus fruits.

Q. It includes canned products? A. Yes.

Q. Prior to 1950 did Sunkist Growers use the mark on canned products? A. No.

Q. You stated a moment ago that the existence of the injunction which Calpack had against Sun-Maid was taken into consideration by Sunkist Growers in making the 1950 purchase of rights. Has there been any circumstance which has occurred since 1950 up to the present time which has eliminated the significance of the injunction to Sunkist Growers?

A. No. Not that I can think of, sir.

Q. In that connection circumstances have stayed the same from 1950 until today?

A. Yes. The only change has been the one we have referred to earlier which is the extension of the use of the [23] trade-mark by Sunkist since that time.

(Deposition of F. R. Wilcox.)

May I state also that that extension of the use of the trade-mark has not only been domestic but also in foreign markets as well where we have registered four products in a number of foreign markets, both actual markets and potential markets.

Q. As general manager of Sunkist Growers would you want to see the Sun-Maid mark used on citrus products? A. No.

Q. Do you feel there might be elements of confusion or possibly impairment of Sunkist sales position in such usage? A. Yes.

Mr. Wood: I am going to object to your suggesting an answer to the witness and leading him. I think you should restate the question.

Mr. Sears: I don't think I have any other questions.

Redirect Examination

By Mr. Wood:

Q. Mr. Wilcox, I think you said this injunction mentioned by Mr. Sears was considered during negotiations culminating in the agreement of 1950. Did I understand you correctly to state that you considered that together with or as part of the good will of Calpack?

A. I said this, that in the purchase of the rights of Calpack to the Sunkist trade-mark that it was the good will, [24] and I think all of the elements of protection for the Sunkist trade-mark by Sunkist Growers, Inc., was a part of the consideration for making the payment.

(Deposition of F. R. Wilcox.)

Q. Was there any discussion at the time of the negotiations relative to specifically mentioning the injunction in the agreement?

A. I don't recall specifically, sir.

Q. With whom did you discuss the injunction at the time of the negotiations?

A. I would say primarily our own counsel.

Q. Would that be Mr. Lyon and anyone else?

A. And Mr. Farrand.

Q. Was it discussed with any representative of Calpack?

A. Not to my knowledge.

Q. Who in the Calpack organization called your attention to the existence of this injunction?

Mr. Sears: Of course it is a matter of public record, Mr. Wood. There is a published decision on it.

Q. (By Mr. Wood): What is your answer?

A. I wouldn't know that, sir.

Q. Isn't it true you did not discuss the matter of the injunction with anyone during the negotiations, anyone on Calpack's side?

A. I can't recollect so doing.

Mr. Sears: I didn't hear the answer, Mr. Wilcox. [25]

The Witness: I can't recollect so doing.

Q. (By Mr. Wood): And if there was any discussion relative to the injunction participated in by you it was probably with Mr. Lyon?

A. I would say Mr. Lyon, and Mr. Farrand.

(Deposition of F. R. Wilcox.)

both of whom are active in our negotiations. We relied on them for legal advice.

Q. Do you remember any statement made by Mr. Farrand in connection with the injunction prior to the agreement in 1950? A. No.

Q. Do you remember any statement made by Mr. Lyon relative to the injunction?

A. No.

Q. When was the existence of this injunction first brought to your attention?

A. The first I knew about it was during our negotiations in 1949 and 1950.

Q. Under what circumstances was it called to your attention? A. I do not recall.

Q. Is it possible that it was not mentioned at all?

A. No. It was discussed as part of the whole broad program.

Q. However, you don't remember with whom it was [26] discussed. Isn't that right?

A. As I have stated, to my knowledge the only discussion was with our attorneys.

Q. But you don't remember any statement made by either counsel relative to the injunction?

A. No, I do not.

Q. When you stated that it was taken into consideration as part of the good will could you state what in your opinion is meant by good will?

A. Trade-marks if they are of value, and we felt this was of value as indicated by the amount of money in paying for it, carries a certain significance to the public, and to the trade. With that I think

(Deposition of F. R. Wilcox.)

also goes a certain amount of public protection of the trade-mark. That is my conception of the good will that it carries which we constantly try to build up.

Q. Do you think the injunction we are speaking of had any significance to the public?

A. I would say insofar as any trade-mark has to be protected, if it has value, just as all of us do with our respective trade-marks and properly use them so there is no confusion in the minds of the public as to the significance of the trade-mark and the importance of the trade-mark.

Q. Do you remember prior to the agreement of 1950 discussing the matter of the injunction with anyone else in the sunkist organization other than the attorneys?

A. No.

Q. Did you contemplate at the time of the negotiations and when you were evaluating the good will that the assignment agreement of 1950 conveyed the injunction with it?

A. As far as I am concerned personally I did not consider that.

Mr. Sears: That of course is a written document. Excuse me for interrupting, Mr. Wood. It will speak for itself.

Mr. Wood: The point I am making, and as I understand there is nothing in writing in the agreement covering the injunction.

Q. Is that right, Mr. Wilcox?

(Deposition of F. R. Wilcox.)

A. It is not specifically mentioned to my recollection. I would want to review it.

Q. Would you say the injunction was mentioned in the agreement in any general way by reference to some other terminology?

A. No, except as I say in the general clause of good will and in making this purchase we certainly were careful in not giving up any rights that we had in Sunkist but rather to obtain additional rights, and that is what I mean, that we did not want in any way to lessen the rights and the value of the trade-mark to us in obtaining whatever rights and privileges Calpack had. [28]

Q. I understand you stated you did not feel that the injunction went along with the trade-marks yet you feel it was part of the benefits acquired by Sunkist. Is that right?

A. We did not acquire the injunction, of course, under the 1950 agreement.

Q. You did not acquire the injunction?

A. No, but having knowledge that it was there I would say it entered into our whole broad thinking and that it was in effect some protection.

Q. If you did not acquire it, I take it you assumed it stayed with Calpack. Is that right?

A. Wherever it was lodged and that was the place for it.

Q. Did you know at the time the injunction was obtained at the behest of Calpack? A. Yes.

Q. California Fruit Growers Exchange was not a party to any proceeding in connection with ob-

(Deposition of F. R. Wilcox.)

taining the injunction? A. No.

Q. Was it a secret party in any way?

A. No.

Q. Would it be fair to state that your understanding was that the injunction, for whatever value it had, remained in Calpack? [29]

A. That is right, yes.

Q. You obtained nothing of benefit under the injunction by the agreement?

Mr. Sears: That is not what he testified to.

Mr. Wood: I am trying to get Mr. Wilcox to state exactly what the situation was at the time. We have established that the injunction did not pass to Sunkist Growers.

The Witness: That is right.

Q. (By Mr. Wood): If it did not pass to Sunkist Growers do you mean it stayed with California Packing Corporation? A. Yes.

Q. Would you explain why this injunction had any value in considering the value that you were getting under this agreement?

A. I think only as I have indicated, as a part of the whole good will and establishing the rights of Sunkist which we did acquire from Calpack.

Q. You understand you did acquire Calpack's good will in connection with the Sunkist mark, is that right? A. Yes.

Q. Then it was not your understanding, I take it, that you acquired any rights under the injunction. Is that right? [30] A. No, sir.

Q. You can see my difficulty, Mr. Wilcox. I am

(Deposition of F. R. Wilcox.)

trying to determine why at that time the injunction had any significance to you as a consideration or anything to be considered during the negotiations if you knew at the time that the injunction stayed with Calpack?

A. Well, I would say just as a part of this broad protection of the Sunkist trade-mark.

Q. It was your understanding then the fact that this injunction remained with Calpack would be some protection for Sunkist Growers. Is that right?

A. Let me say that we felt we knew of it and took no particular part in its disposition one way or the other, but I would say that it was a part of the consideration in the purchase of the whole trade-mark good will.

Q. I am trying to establish when the significance of this injunction really came about, whether it was prior to the agreement or after the agreement.

Mr. Sears: He has already stated it was taken into consideration at the time of the agreement.

Mr. Wood: I am trying to establish how Mr. Wilcox expected to get any benefit under the injunction if the injunction remained with Calpack.

Q. Mr. Wilcox, you stated before there were not any secret agreements in connection with this agreement of 1950. Was there a secret agreement between the California [31] Packing Corporation and Sunkist Growers to the effect that California Packing Corporation would enforce the injunction which remained with it?

A. No.

(Deposition of F. R. Wilcox.)

Mr. Lyon: I think you should explain to the witness what you mean by secret.

Q. (By Mr. Wood): I mean not expressed in the agreement. A. No, there was nothing.

Q. Would you state how you feel the injunction would be of any benefit to Sunkist Growers, Inc., if it remained with Calpack?

A. It must have had some significance in the protection of the trade-mark when it was originally obtained and when the matter was brought, as I have stated——

Q. Of course you are speculating now. We are trying to find out what you know about it.

A. No. I would not have any knowledge of that.

Q. Is it not true that the matter of the injunction, if it was brought up at the time of the negotiations, was not given any weight whatsoever?

A. No. I would say that was not the case because I think all of the matters were brought up of which this was one and had some weight in our whole thinking and negotiations which of course was complicated from the inception as you can well understand.

Q. What were some of the complications? [32]

A. Arriving at amounts of what to pay, being sure that we would get all of the good will that was in the Calpack Corporation, and things of that nature.

Q. Did anyone in the Calpack organization at any time ever mention that some consideration

(Deposition of F. R. Wilcox.)

would be forthcoming in the future for the sale of the injunction, or any words to that effect?

A. No, not to my knowledge.

Q. Did you discuss the testimony you have given today with Mr. Lyon? A. Yes.

Q. Did you discuss the value of the injunction during the negotiations with Mr. Lyon?

A. What do you mean?

Q. You said the injunction was a consideration during the negotiations.

A. Yes, it was discussed at that time.

Q. Have you discussed with Mr. Lyon recently the value of the injunction during the negotiations?

A. No, not that I recall.

Mr. Wood: That is all.

Recross-Examination

By Mr. Sears:

Q. The 1950 agreement provides that Calpack was to render aid and assistance in connection with the Sunkist mark. Is that correct? [33]

A. Yes.

Q. Was it your general expectation that Calpack would enforce the injunction, the existence of which you knew at the time of the 1950 agreement?

A. I don't think I considered it one way or the other, sir.

Q. But you have stated that the injunction was taken into consideration? A. Yes.

Q. In connection with the acquisition of rights?

A. That is right.

Mr. Sears: I have no other questions.

Mr. Wood: That is all.

/s/ F. R. WILCOX.

Subscribed and sworn to before me this 3rd day of July, 1957.

[Seal] /s/ MIGNON E. LANGILL,
Notary Public in and for the County of Los Angeles, State of California.

My Commission expires October 23, 1957. [34]

State of California,
County of Los Angeles—ss.

I, Byron Oyler, a Notary Public in and for the County of Los Angeles, State of California, do hereby certify that F. R. Wilcox, the witness named in the foregoing deposition, was before the commencement of his deposition duly sworn to testify the truth, the whole truth, and nothing but the truth; that said deposition was taken, pursuant to Notice, at the itme and at the place as herein set forth; that said deposition was taken down in shorthand by me and thereafter transcribed into type-writing, and I hereby certify that the foregoing 34 pages contain a full, true and correct transcription of my shorthand notes so taken.

I further certify that it was stipulated by counsel that said deposition may be read over, corrected and signed by the witness before any notary public.

I further certify that I am neither counsel for nor related to any party to said action, nor in any-wise interested in the outcome thereof.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal, this 28th day of June, 1957.

[Seal] /s/ BYRON OYLER,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed July 8, 1957. [35]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 126, inclusive, containing the original:

Complaint.

Answer.

Amended Answer.

Findings of Fact and Conclusions of Law, filed March 26, 1934.

Final Decree of Dismissal, filed March 26, 1934.

Mandate of Circuit Court of Appeals, filed 6/15/36. (Copy) Minute Order 6/15/36.

Final Decree, filed June 15, 1936.

Writ of Injunction.

Supplemental Affidavit of Earle G. Grainger.

Notice of hearing of Motion and Motion to dissolve Injunction or, in alternative, to join Sunkist Growers, Inc., as a party.

Opinion of Court, filed July 8, 1958.

Findings of Fact, Conclusions of Law and Order denying Motion of Defendant to Dissolve Injunction.

Notice of Appeal.

Designation of Contents of Record on Appeal.

Stipulation and Order extending time within which Appellee may designate an additional portion of the record on appeal.

Minute Order 9/22/58 re extending time to file and docket record on appeal.

B. (Copy) Contract of March 10, 1917.

C. Exemplar of Sun-Kist trade-mark, attached to "Amended Answer."

D. Deposition of Charles Griffin, Jr., and exhibits Deposition of F. R. Wilcox, and exhibits.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Dated: October 13, 1958.

JOHN A. CHILDRESS,
Clerk;

[Seal] By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16223. United States Court of Appeals for the Ninth Circuit. Sun-Maid Raisin Growers of California, a Corporation, Appellant, vs. California Packing Corporation, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed: October 14, 1958.

Docketed: October 16, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

16223

SUN-MAID RAISIN GROWERS OF CALIFORNIA, a Corporation,

Defendant-Appellant,

vs.

CALIFORNIA PACKING CORPORATION, a Corporation,

Plaintiff-Appellee.

DEFENDANT-APPELLANT'S STATEMENT
OF POINTS TO BE RELIED UPON ON
APPEAL

The points on which appellant, Sun-Maid Raisin Growers of California intends to rely in this court in this case are as follows:

1. The court erred in holding that the change of ownership in the trade-mark Sun-Kist, and the good will attached to it, does not alter the rights of the parties to the agreement of March 10, 1917, and to the injunction, which limited Sun-Maid's use of the trade-mark to raisins and raisin products only.

2. The court erred in holding that plaintiff, the assignor of the mark Sun-Kist, is obligated to defend against violation of the injunction, even though it is no longer the owner of the mark.

3. The court erred in holding that the continuance of the injunction does not have an oppressive

effect upon the business of defendant in the light of changed conditions.

4. The court erred in holding that the contract which stemmed from litigation relating to the Sun-Kist and Sun-Maid trade-marks is not now an illegal restraint of trade as applied to defendant's business.

5. The court erred in holding that the injunction sought to be dissolved was not for the sole purpose of protecting plaintiff's interest in the trade-mark Sun-Kist.

6. The court erred in holding that it would be inequitable to substitute the assignee of the mark Sun-Kist as a new party plaintiff.

7. The court erred in refusing to dissolve the injunction of June 15, 1936.

District Court.

BOYKEN, MOHLER & WOOD,
GORDON WOOD,

By /s/ GORDON WOOD,
Attorneys for Defendant, Sun-Maid Raisin Grow-
ers of California.

Certificate of service attached.

[Endorsed]: Filed October 23, 1958.

16223

~~No. 15,087~~

**United States Court of Appeals
For the Ninth Circuit**

SUN-MAID RAISIN GROWERS OF CALIFORNIA,
a Corporation,

Appellant,

vs.

CALIFORNIA PACKING CORPORATION, a
Corporation,

Appellee.

**BRIEF OF APPELLEE
CALIFORNIA PACKING CORPORATION**

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PILLSBURY, MADISON & SUTRO,

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FILE

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No. 15,087

IN THE

**United States Court of Appeals
For the Ninth Circuit**

SUN-MAID RAISIN GROWERS OF CALIFORNIA,
a Corporation,

Appellant,

vs.

CALIFORNIA PACKING CORPORATION, a
Corporation,

Appellee.

**BRIEF OF APPELLEE
CALIFORNIA PACKING CORPORATION**

JURISDICTION.

The district court had jurisdiction to enter its order denying the motion of defendant Sun-Maid Raisin Growers of California to dissolve the injunction (28 U.S.C. 1332; *United States v. Swift & Co.* (1932) 286 U.S. 106).

This Court has jurisdiction to review the order of the district court (28 U.S.C. 1291).

INTRODUCTION.

Defendant has appealed (R. 113) from the order of the district court (R. 112) denying the motion of defendant

(R. 83-84) to dissolve a permanent injunction entered on June 15, 1936, pursuant to mandate of this Court (R. 74-81).

The fragmentary statement of the case by defendant in its opening brief (pp. 2-4) does not fairly present the facts and background of this extended litigation. Particularly noteworthy is the failure of defendant to review the prior proceedings before this Court which resulted in the original issuance of the permanent injunction.

The motion of defendant to dissolve the injunction rests upon a single alleged change of circumstance—plaintiff's sale in 1950 of its rights of ownership in the trade-mark "Sun-Kist" (Opening Brief of Defendant (hereinafter cited as "Op. Br.") 21; R. 171-178). Defendant's entire argument proceeds upon the theory that the contract of March 10, 1917 (R. 15-21), which settled and defined defendant's rights of ownership in the trade-mark "Sun-Maid" as limited to use on raisins and raisin products only, was a covenant ancillary to plaintiff's ownership of rights in the trade-mark "Sun-Kist." All of defendant's assertions that plaintiff either necessarily relinquished its rights under the 1917 contract when it sold its rights in the trade-mark "Sun-Kist" (Op. Br. 10-14) or that, if plaintiff retained its rights under the contract, the contract became an illegal restraint of trade (Op. Br. 15-21), are based upon the ancillary covenant theory.

This theory of defendant is in the teeth of (a) the findings of fact of the district court (R. 109-111), (b) the original decision of this Court directing that the permanent injunction issue (*California Packing Corporation v.*

Sun-Maid R. Growers (9 Cir. 1936) 81 F.2d 674), and (c) the prior decision of the Court of Customs and Patent Appeals respecting defendant's limited rights of ownership in the trade-mark "Sun-Maid" (*California Packing Corp. v. Sun-Maid Raisin Growers* (Ct.Cust.& Pat.App. 1933) 64 F.2d 370). The findings of the district court, consistent with those prior decisions, are that plaintiff's rights under the contract of March 10, 1917—and its rights to continued protection by the injunctive decree—did not and do not depend upon plaintiff's ownership of rights in the trade-mark "Sun-Kist."

Defendant has merely seized upon the irrelevant circumstance of plaintiff's sale of those trade-mark rights to make a renewed attack upon the contract of March 10, 1917, which this Court has previously held binding upon defendant. The district court properly refused to lend its hand to defendant's latest scheme to evade its contract obligations and to claim rights of ownership in the trade-mark "Sun-Maid" to which it has never been entitled.

STATEMENT OF THE CASE—THE HISTORY OF THIS LITIGATION.

Plaintiff California Packing Corporation brought this action for an injunction permanently restraining defendant from using the trade-mark "Sun-Maid" on non-raisin products in violation of its limited ownership rights therein established by a written contract dated March 10, 1917 (R. 12, 15).

Prior to 1917, predecessors in interest of plaintiff and defendant were engaged in trade-mark litigation in New

York, the claim being that the "Sun-Maid" mark "was and is mistaken for and confused with the trade-mark 'Sunkist' " (R. 16, 7-8, 43-44). That litigation was settled by an agreement of March 10, 1917 (R. 15-21). Defendant's predecessor agreed to use the "Sun-Maid" mark "*only* on packages containing raisins or on packages containing food products or confections made wholly or in part from raisins"¹ (R. 18). In consideration thereof, the pending suit was dismissed and plaintiff and its predecessor agreed not to further dispute the defendant's rights in the trade-mark "Sun-Maid" as so limited to raisin products (R. 17-18). The contract also provided for continuance of certain agreements and leases between the predecessors of plaintiff and defendant relating to the packing and selling of raisins and facilities therefor (R. 15-18).

Defendant thereafter acquired its predecessor's business, including its rights in the trade-mark "Sun-Maid," in a bankruptcy proceeding (R. 47, 69). Despite the limited rights it acquired, defendant endeavored to register the trade-mark "Sun-Maid" for products other than raisin products. Plaintiff successfully contested such attempted registration. The Court of Customs and Patent Appeals held that, as a consequence of the 1917 contract, defendant had ownership rights in the "Sun-Maid" mark for use on raisin products only, and that it accordingly could not register the mark for any other product (*California Packing Corp. v. Sun-Maid Raisin Growers* (Ct. Cust.&Pat.App. 1933) 64 F.2d 370). The court said (p. 373):

¹Unless otherwise indicated, emphasis is ours throughout this brief.

“In an opposition proceeding, where ownership of a mark in the applicant is challenged, registration cannot be allowed without first determining that question. If an applicant has *by contract divested himself of ownership* of and the right to use a mark for which he makes application for registration, he is not the ‘owner’ of the mark.”

And the court concluded (pp. 374-375):

“It is our opinion that appellee [defendant] is bound by the terms of said contract, and * * * under the contract, appellee is not the owner of the [“Sun-Maid”] mark, and was precluded from using the same as applied to such [nonraisin] goods.”

In violation of the contract and its defined ownership rights in the trade-mark, defendant commenced using the “Sun-Maid” mark on nonraisin products, and in 1929 plaintiff brought this injunction suit to prevent such use. The district court initially refused to enjoin defendant (*California Packing Corp. v. Sun-Maid Raisin Growers* (S.D.Cal. 1934) 7 F.Supp. 497). Plaintiff appealed and this Court reversed, directing that a permanent injunction issue (*California Packing Corporation v. Sun-Maid R. Growers* (9 Cir. 1936) 81 F.2d 674).² Pursuant to man-

²It may be noted that the district court made findings of fact in connection with its original conclusions of law and decree dismissing plaintiff’s complaint (R. 67-73), including a finding that there was no confusing similarity between the trade-marks “Sun-Kist” and “Sun-Maid” (Finding 16, R. 71), on which finding defendant now seeks to place some reliance (Op.Br. 3). Defendant ignores the fact that the district court vacated its original decree, and the findings and conclusions on which it was based, pursuant to mandate of this Court (R. 78, 93, 102). The final decree entered herein, approved as to form by the attorneys for defendant, granted the injunction as prayed for by plaintiff in the complaint (R. 77-79, 91-92).

date of this Court, the district court entered its final decree dated June 15, 1936, perpetually enjoining defendant from asserting rights of ownership in the "Sun-Maid" mark beyond those established by the 1917 contract (R. 74-81).

In approaching the problem of whether an injunction should issue, this Court stated the primary question as follows (81 F.2d 676):

"The primary question in the case is whether or not the appellee Sun-Maid Raisin Growers of California is bound by the contract of March 10, 1917."

Holding that defendant could not enjoy the benefits of the 1917 contract but escape the corresponding burdens, this Court said (81 F.2d 676-677):

"[Defendant's predecessor] could not convey any right to the use of a trade-mark which it did not own, and that right had been expressly limited by the agreement of March 10, 1917, wherein the parties had agreed to limit the use of that trade-mark ["Sun-Maid"] to raisins and raisin products. Consequently, the trustee in bankruptcy sold that right and no other. By its agreement to refrain from using the trade-mark 'Sun-Maid' on any other than raisin products, it acquired the unquestioned right, so far as the parties here involved were concerned, to the use of that trade-mark on raisin products. *The contract* of settlement of the divers claims of the parties to the use of the trade-marks 'Sun-Maid' and 'Sun-Kist' *was based upon mutual concessions as to doubtful claims. The appellee [defendant] has enjoyed the fruits of that contract ever since it was executed and has packed nearly \$250,000,000 worth of raisin products under the trade-mark 'Sun-Maid.' The appellee*

having purchased the rights of one of the parties to the contract of March 10, 1917, cannot avoid the corresponding burden."

By agreement dated September 20, 1950, plaintiff assigned its rights in the trade-mark "Sun-Kist" to California Fruit Growers Exchange (now Sunkist Growers, Inc.) for \$1,250,000 (R. 171-178).³

On December 14, 1954, defendant filed a motion in the district court to dissolve the permanent injunction, on the ground that plaintiff's said assignment of rights in the "Sun-Kist" mark justified abrogation of the 1917 contract and dissolution of the injunction based on defendant's limited ownership rights in the "Sun-Maid" mark. On January 30, 1956, the district court (Judge Hall) entered its order dismissing said motion without prejudice, on the ground that defendant had not sought leave of this Court, pursuant to whose mandate the injunction had issued.

Defendant appealed from said order on the ground that leave was not required, but in its brief also applied for leave to proceed in the district court. This Court dismissed defendant's purported appeal from the interlocutory order and, treating the proceeding as an application for leave, granted leave for a hearing on the merits of

³Prior to such assignment, rights in the "Sunkist" mark for use on different products were shared by Sunkist Growers and plaintiff pursuant to terms of an agreement dated October 7, 1915 (R. 179-181); this agreement was approved in *California Fruit Growers Exch. v. Windsor Beverages* (7 Cir. 1941) 118 F.2d 149. Plaintiff used the mark in the form "Sun-Kist" and Sunkist Growers in the form "Sunkist," but these forms were regarded as equivalents (R. 152). The 1950 agreement supplanted the 1915 agreement.

the motion in the district court (*Sun-Maid R. Growers v. California P. Corp.* (9 Cir. 1957) 244 F.2d 895). The Court stated (p. 897):

“The permission to proceed in the District Court does not indicate that this Court has or expresses any opinion on the merits or the validity or invalidity of the motion. The District Court is left free to take such action as is just and proper.”

On June 4, 1958, defendant renewed its motion to dissolve the injunction, and moved in the alternative to join Sunkist Growers, assignee of plaintiff's rights in the “Sun-Kist” trade-mark, as a party to this proceeding. Defendant has never claimed that any condition or circumstance has changed since the permanent injunction issued except for the one fact that in 1950 plaintiff transferred its rights in the “Sun-Kist” mark to Sunkist Growers (Op.Br. 21).

The motion was heard by the Honorable Leon R. Yankwich, Chief Judge of the United States District Court for the Southern District of California. On July 7, 1958, Judge Yankwich handed down an opinion stating his reasons for refusing to dissolve the injunction or to join Sunkist Growers as a party to the proceeding (*California Packing Corp. v. Sun-Maid Raisin Gr., Etc.* (S.D.Cal. 1958) 165 F.Supp. 245; R. 85-106). Findings of fact, conclusions of law and a formal order denying the motion of defendant were duly entered (R. 109-112).

Findings of fact 4 through 11 were as follows (R. 110-111):

“4. The injunctive decree of June 15, 1936, was not based upon plaintiff's then existing rights of

ownership in the 'Sun-Kist' trade-mark, but upon plaintiff's rights and defendant's obligations under the contract of March 10, 1917.

5. The validity and effect of the contract of March 10, 1917, which compromised disputed claims, and of the injunctive decree of June 15, 1936, which enforced said contract, do not depend upon ownership by plaintiff of rights in the 'Sun-Kist' trade-mark.

6. Plaintiff has not assigned its rights under the contract of March 10, 1917, or under the injunctive decree of June 15, 1936.

7. By agreement dated September 20, 1950, plaintiff sold its rights in the 'Sun-Kist' trade-mark to California Fruit Growers Exchange, now Sunkist Growers, Inc.

8. The sale by plaintiff of its rights in the 'Sun-Kist' trade-mark did not terminate its rights under the contract of March 10, 1917.

9. There has not been any change in any material circumstance relating to the validity or enforceability of the contract of March 10, 1917, or the injunctive decree of June 15, 1936, since entry of said decree.

10. There is no evidence that the contract of March 10, 1917, or the injunctive decree of June 15, 1936, has foreclosed defendant from selling its products or any of them in any market, or that there is any lack of competition in the production and sale of fruit and vegetable products.

11. The effect on defendant of the injunctive decree of June 15, 1936, has not changed since its entry; today as in 1936 the injunction merely enforces the contract of March 10, 1917, and the limited ownership rights of defendant in the 'Sun-Maid'

trade-mark for use on raisins and raisin products only.”

Judge Yankwich explained the reasons for his findings in part as follows (emphasis by the court):

“It is axiomatic that the settlement of a disputed claim is a good consideration for an agreement to compromise. 1 C.J.S. Accord and Satisfaction § 4, p. 475” (165 F.Supp. 253).

“In truth, the final injunction issued was based upon one ground only, namely, that Sun-Maid’s predecessor *by contract* had limited itself to using the Sun-Maid trademark on raisins and raisin products only. So that, in reality, Sun-Maid is seeking now to be relieved of a contract from which courts repeatedly have declined to relieve them in the past” (165 F. Supp. 253-254).

“Under the guise of modifying the injunction, the defendant, in reality, is seeking to be relieved of the burdens of the contract. The detriments of which they now complain flow not *from the injunction*, but from the *contract* their predecessor entered into, and by which they are bound” (165 F.Supp. 254).

“Grant that a court of equity *may*, upon a clear showing of unforeseen and unanticipated conditions, modify an injunction. United States v. Swift & Co., 1932, 286 U.S. 106, 119, 52 S.Ct. 460, 76 L.Ed. 999. Nevertheless, that right does not extend to rights fully accrued upon facts so nearly permanent as to be substantially impervious to it:

‘A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. * * * The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as

to be substantially impervious to change.' United States v. Swift & Co., supra, 286 U.S. at page 114, 52 S.Ct. at page 462. California State courts have adopted and applied this principle. See Sontag Chain Stores Co. v. Superior Court, 1941, 18 Cal. 2d 92, 94-96, 113 P.2d 689; Woods v. Corsey, 1948, 89 Cal.App.2d 105, 113-114, 200 P.2d 208.

Here, nothing has happened except a change in the ownership of the mark which had formed the basis of the lawsuit which preceded the Agreement of March 10, 1917. To repeat, the injunction merely confirmed it and nothing has been produced at this hearing to indicate that the injunction

'has been turned through changing circumstances into an instrument of wrong.' United States v. Swift & Co., supra, 286 U.S. at page 115, 52 S.Ct. at page 462'' (165 F.Supp. 254).

"On the contrary, *it would be inequitable*, at the present time, when no other conditions exist, to relieve the defendant of the binding effect of its predecessor's contract.

Nor would it be fair to substitute a new party-plaintiff,—Sun-Kist Growers, Inc.,—which was not a party to the original litigation, and relitigate a judgment which has been final for over twenty years.

In truth, there is nothing left to litigate'' (165 F. Supp. 255-256).

Defendant has taken this appeal (R. 113) from the order denying dissolution of the permanent injunction (R. 112).

THE ISSUES FOR DECISION.

Defendant contends that the injunction issued on the basis of plaintiff's ownership of rights in the "Sun-Kist" mark and that, when plaintiff assigned those rights, the basis for the injunction disappeared.

Plaintiff submits that such contentions are without support, and that defendant is fighting the facts and the law in a further effort to relitigate issues already determined against defendant. The record, including the findings of fact by Judge Yankwich and the prior decisions of this Court and of the Court of Customs and Patent Appeals, establishes that the injunction issued on the basis of the 1917 contract which divested defendant of rights of ownership in the "Sun-Maid" mark except for use on raisin products; that the validity of that contract has been finally determined; and that there has not been any material change of circumstance which could warrant dissolution of the injunction.

It is plaintiff's position that the order of the district court should be affirmed for the reasons that:

(a) Under the circumstances, the court did not have power to set aside the injunctive decree herein;

(b) Assuming that such power existed, the trial court correctly found that defendant had not proved any extreme and unexpected hardship arising from changed and unforeseeable conditions such as could justify setting aside the decree; and

(c) The trial court properly declined to require the joinder of Sunkist Growers, Inc., as a party to this proceeding.

ARGUMENT.

A. THE COURT DID NOT HAVE POWER TO SET ASIDE THE INJUNCTIVE DECREE HEREIN WHICH PERMANENTLY ESTABLISHED PROPERTY RIGHTS AND IS NOT SUBJECT TO CHANGE.

The leading case on the law of modification of injunctive decrees is *United States v. Swift & Co.* (1932) 286 U.S. 106. In that case the United States Supreme Court stated that an injunction entered in a Government anti-trust suit was subject to modification on proper showing since it contemplated supervision of changing conduct and was thus provisional and tentative. The court distinguished such an injunction from one which merely gave protection to fully accrued rights. The court said (p. 114):

“A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. [Citing cases.] The distinction is between *restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change*, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative.”

Another leading case, cited with approval in the *Swift* case, *supra*, is *Ladner v. Siegel* (1930) 298 Pa. 487, 148 Atl. 699. Stating the general rule of finality of equitable decrees, the court said (p. 701):

“There are many equitable proceedings that illustrate the general rule, *such as specific performance, bills to reform instruments, and others. A final decree in such equitable proceeding is unchangeable, except possibly through gross mistake to be corrected*

by a bill of review, and not then if any intervening right has appeared since entering the decree.”

The Supreme Court of California has cited the *Swift* and *Ladner* cases, *supra*, as the two leading cases on the distinction between decrees which give effect to fully accrued rights and provisional decrees which supervise changing conduct (*Sontag Chain Stores Co. v. Superior Court* (1941) 18 Cal.2d 92, 95).

The decree herein enforced a private contract which defined defendant's limited rights of ownership in particular property—the trade-mark “Sun-Maid.” At the time this Court directed issuance of the injunction on the basis of the 1917 contract, it stated (*California Packing Corporation v. Sun-Maid R. Growers* (9 Cir. 1936) 81 F.2d 674, 680):

“* * * the rights of the parties were definitely settled by contract entered into between the appellant and the predecessors of the appellee. There is no uncertainty about it.”

The crucial circumstance before this Court then—as now—was that the 1917 contract divested defendant of ownership rights in the trade-mark “Sun-Maid” except for use on raisins and raisin products. This Court stated (p. 678):

“The appellee [defendant] limited its right of ownership in the trade-mark ‘Sun-Maid’ to the use of it in connection with raisins and raisin products. The contract so states. This view was adopted by the Court of Customs and Patent Appeals in litigation before that court between the parties hereto [*California Packing Corporation v. Sun-Maid Raisin Growers* of

California (Cust.&Pat.App.) 64 F.(2d) 370, 373], where the appellant [plaintiff] was contesting the right of the appellee to register the trade-mark 'Sun-Maid' as to other than raisin products. That court held that the contract of March 10, 1917, gave the Sun-Maid Company only limited ownership in the trade-mark 'Sun-Maid' and that it could not register the mark for any other product. The court said: 'If an applicant has by contract divested himself of ownership of and the right to use a mark for which he makes application for registration, he is not the "owner" of the mark. * * * *Under the contract, appellee is not the owner of the mark, and was precluded from using the same as applied to such [nonraisin] goods.*' "

As Judge Yankwich concluded (165 F.Supp. 256):

"In truth, there is nothing left to litigate."

B. ASSUMING THAT POWER TO MODIFY EXISTED, THE TRIAL COURT CORRECTLY HELD THAT THERE WAS NO SHOWING OF EXTREME AND UNEXPECTED HARDSHIP ARISING FROM CHANGED AND UNFORESEEABLE CONDITIONS TO JUSTIFY DISSOLUTION OF THE DECREE.

1. The trial court did not commit error, much less abuse its discretion, in finding that there had not been any change in any material circumstance affecting the injunctive decree.

Defendant has not established any basis for dissolution of the injunction. In the *Swift* case, supra, the United States Supreme Court stated the controlling legal principle in these terms (286 U.S. 119):

"There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether

anything has happened that will justify us now in changing a decree. *The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of re-adjusting.* * * * No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. *Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation.*”

This Court recently quoted the above passage with approval in refusing to modify an injunction restraining the use of a trade name (*Morse-Starrett Products Co. v. Steccone* (9 Cir. 1953) 205 F.2d 244, 248).

The condition upon which this Court directed that the injunction issue in the first instance was defendant's limited rights of ownership in the “Sun-Maid” mark defined by the 1917 contract. The trial court correctly found that nothing has occurred since issuance of the decree to change that condition (Findings 4, 5, 9, 11; R. 110-111).

It is settled law that findings of fact by a trial court may not in any case be set aside unless clearly erroneous (Fed.Rules Civ.Proc., Rule 52(a); *Jacuzzi Bros. v. Berkeley Pump Co.* (9 Cir. 1951) 191 F.2d 632, 638; 5 Moore's Federal Practice, pp. 2609-2616). It is equally settled that determination of motions for modification or dissolution of prior decrees, where power to set aside the decree exists at all, is uniquely within the judicial dis-

cretion of the trial court, and such determination is reviewable on appeal only for abuse of discretion.

Jackson v. Heiser (9 Cir. 1940) 111 F.2d 310;

Assmann v. Fleming (8 Cir. 1947) 159 F.2d 332, 336;

7 Moore's Federal Practice, pp. 222-227.

In the *Jackson* case, *supra*, this Court affirmed the trial court's order refusing to set aside a judgment, and said (p. 313):

"In this, we cannot say that the court erred; much less that it abused its discretion."

And Moore's treatise, *supra*, summarizing a review of the authorities, states (p. 223):

"If the district court has power to grant relief, then its determination to grant or deny relief normally involves a discretionary appraisal of the facts of the particular case and the relief, if any, to be granted: this matter, then, is largely within the judicial discretion of the trial court."

In this case, Judge Yankwich did not commit error, much less abuse his discretion, in determining that (Finding 9; R. 110-111):

"There has not been any change in any material circumstance relating to the validity or enforceability of the contract of March 10, 1917, or the injunctive decree of June 15, 1936, since entry of said decree."

2. The sole change in condition relied upon by defendant is the 1950 assignment by plaintiff of its rights in the "Sun-Kist" trade-mark; the trial court correctly found that this circumstance was not material to the continued validity of the 1917 contract or the injunctive decree.

Defendant argues that the injunction issued because of plaintiff's ownership rights in the "Sun-Kist" mark; that the injunction would not have issued if plaintiff had not owned such rights; and that when plaintiff assigned those rights to Sunkist Growers in 1950, this sole change of condition justifies dissolution of the injunction (Op. Br. 21).

The fundamental defect in defendant's contention is that the injunction did not issue because of plaintiff's ownership rights in the "Sun-Kist" mark, but because of the 1917 contract and defendant's consequent lack of ownership rights in the "Sun-Maid" mark. As this Court and the Court of Customs and Patent Appeals held, the 1917 contract divested defendant's predecessor of ownership rights in the "Sun-Maid" mark for use on products other than raisins and raisin products. Patently, no subsequent transfer by plaintiff of its rights in the "Sun-Kist" mark could give defendant greater rights of ownership in the "Sun-Maid" mark than defendant ever acquired from its predecessor.

The trial court found (Findings 4, 5, 8; R. 110):

"4. The injunctive decree of June 15, 1936, was not based upon plaintiff's then existing rights of ownership in the 'Sun-Kist' trade-mark, but upon plaintiff's rights and defendant's obligations under the contract of March 10, 1917."

"5. The validity and effect of the contract of March 10, 1917, which compromised disputed claims,

and of the injunctive decree of June 15, 1936, which enforced said contract, do not depend upon ownership by plaintiff of rights in the 'Sun-Kist' trade-mark."

"8. The sale by plaintiff of its rights in the 'Sun-Kist' trade-mark did not terminate its rights under the contract of March 10, 1917."

Explaining its findings, the trial court stated (165 F. Supp. 253-254):

"In truth, the final injunction issued was based upon one ground only, namely, that Sun-Maid's predecessor *by contract* had limited itself to using the Sun-Maid trademark on raisins and raisin products only. So that, in reality, Sun-Maid is seeking now to be relieved of a contract from which courts repeatedly have declined to relieve them in the past" (emphasis by the court).

And with particular reference to the lack of significance of plaintiff's ownership or nonownership of rights in the trade-mark "Sun-Kist" to validity of the contract defining defendant's rights in the trade-mark "Sun-Maid," the trial court stated (165 F.Supp. 255, n. 1):

"And we may disregard entirely the fact that it [the 1917 contract] stemmed from the settlement of a lawsuit involving the alleged infringement of the plaintiff's trademark Sun-Kist. For, if the plaintiff's predecessor, without possessing any mark of its own, had, for adequate consideration, entered into an agreement with the defendant's predecessor in which they agreed *not to use* Sun-Maid on any product other than raisins and raisin products, the contract would be just as effective" (emphasis by the court).

We submit that not only were the foregoing findings correct and within the discretion of the trial court but indeed that any other findings would have been in the teeth of this Court's original decision.

3. The trial court correctly held that there was no showing of extreme and unexpected hardship on defendant and that, on the contrary, dissolution of the injunction would destroy contract rights of plaintiff.

Under the settled rule of the *Swift* case (quoted at pp. 15-16, supra), to justify dissolution of the injunctive decree defendant must not only show changed conditions, but must also make a "clear showing of grievous wrong" and of "extreme and unexpected" hardship arising from such changes. Here, defendant is not suffering from any restriction whatever other than that originally established by the 1917 contract and affirmed by the injunctive decree entered pursuant to mandate of this Court. Now, as when the decree issued (and as when the contract was made), defendant simply does not have ownership rights in the "Sun-Maid" mark except for use on raisins and raisin products (Finding 11; R. 111).

Defendant is not seeking relief from an oppressive injunction as a result of changed conditions, but rather relief from the express terms of a contract binding upon it. Stripped of pretense, defendant's objective is to overturn the prior decision of this Court. Notwithstanding previous rulings that defendant was bound by the contract of March 10, 1917, and was not the owner of the trade-mark "Sun-Maid" except for use on raisins and raisin products, defendant, through the device of a

motion to dissolve the injunction, seeks to evade the contract and assert greater rights of ownership.

As the trial court observed (165 F.Supp. 254):

“Under the guise of modifying the injunction, the defendant, in reality, is seeking to be relieved of the burdens of the contract. The detriments of which they now complain flow not *from the injunction* but from the *contract* their predecessor entered into, and by which they are bound. * * *

* * * * *

* * * Here nothing has happened except a change in the ownership of the mark which had formed the basis of the lawsuit which preceded the Agreement of March 10, 1917. To repeat, the injunction merely confirmed it and nothing has been produced at this hearing to indicate that the injunction

‘has been turned through changing circumstances into an instrument of wrong.’ United States v. Swift & Co., *supra*, 286 U.S. at page 115, 52 S.Ct. at page 462” (emphasis by the court).

Put another way, defendant is saying no more than that since it has complied with the injunctive decree for a number of years it should now be excused. In *Walling v. Harnischfeger Corporation* (E.D.Wis. 1956) 142 F.Supp. 202, affirmed (7 Cir. 1957) 242 F.2d 712, defendant moved to dissolve an injunction entered twelve years previously, on the ground that it had fully complied with the terms of the injunction over the years and that other changes in the business had occurred. The court refused to dissolve the injunction and stated (p. 204):

“Would a modification serve ‘to effectuate or thwart the basic purpose of the original decree’

which was to permanently restrain certain conduct? Applying that test one cannot say vacating the judgment would serve to effectuate the basic purpose of that decree. This court is not convinced that a sufficient showing has been made to comply with the test [of changed condition] laid down in *United States v. Swift & Co.*, *supra*.

* * * *Certainly compliance with the decree cannot be said to be such a changed condition."*

See also:

Morse-Starrett Products Co. v. Steccone (9 Cir. 1953) 205 F.2d 244, 248.

The purpose of the decree herein was to finally establish defendant's limited ownership rights in the "Sun-Maid" mark in accordance with the provisions of the 1917 contract. Dissolution of the injunction would obviously thwart and not effectuate that purpose, and would also, in effect, destroy plaintiff's contract rights.

Defendant has endeavored to obscure its controlling lack of ownership rights in the trade-mark "Sun-Maid," and the complete absence of any new and extreme hardship on defendant, by arguing either that plaintiff relinquished its rights under the 1917 contract when it assigned its rights in the trade-mark "Sun-Kist," or that the contract has become an unlawful restraint of trade (Op.Br. 10-21).

These arguments must stand or fall on defendant's premise that the 1917 contract (and the injunction which enforced it) was a covenant ancillary to plaintiff's rights in the trade-mark "Sun-Kist." This premise is squarely contrary to the findings of fact of the trial court (Findings

4, 5, 8; R. 110; quoted at pp. 18-19, supra), and without support in the record. Defendant's arguments necessarily fall with the false premise.

To make defendant's attempted analogy of the 1917 contract to an ancillary covenant accompanying sale of a business (Op.Br. 15) fit at all, defendant would have to show that defendant had sold plaintiff the "Sun-Kist" mark for use in a nonraisin business (covenanting not to use the trade-mark "Sun-Maid" in any nonraisin business); and that plaintiff thereafter transferred or abandoned its nonraisin business. There are no such facts. In the 1917 agreement defendant's predecessor did not sell the "Sun-Kist" mark or any business to plaintiff or its predecessor (R. 15-21). Plaintiff (and its predecessor) was at that time already engaged in a nonraisin business (packing and selling canned fruits and vegetables) in connection with which it used the trade-mark "Sun-Kist" among other marks; and plaintiff has engaged continuously in such business to this date (R. 122, 179).

As the trial court found, the 1917 contract was an independent settlement agreement. Defendant's tortured ancillary covenant argument is merely a renewed effort by defendant to construct a theory to evade a contract which this Court has previously held binding upon it.

4. Plaintiff has subsisting rights in the 1917 contract which entitle it to the continued protection of the injunctive decree.
- (a) Plaintiff gave ample consideration for the settlement agreement under which defendant has received great benefits.

The injunctive decree herein established the validity and interpretation of a contract compromising an action in-

volving trade-mark infringement and related issues (Finding 3; R. 109-110). Plaintiff and its predecessor agreed to and did withdraw the suit then pending in a New York Federal District Court. Plaintiff agreed to and did permit defendant and its predecessor to use the trade-mark "Sun-Maid" on packages containing raisins or raisin products free of any further interference. The parties agreed to continue certain agreements and leases relating to the packing and marketing of raisins and facilities therefor. In consideration thereof, ownership rights in the "Sun-Maid" mark were limited to raisins and raisin products. If the injunction were dissolved, plaintiff would be deprived of contract rights for which it gave ample consideration, and defendant would take the benefits received under the contract free of corresponding burdens (Findings 12, 13; R. 111). In its decision directing entry of the injunction this Court observed that by 1936 defendant had already packed about \$250,000,000 worth of raisin products under the trade-mark "Sun-Maid" (81 F.2d 676). See also *Hughes Tool Co. v. A. F. Spengler Co.* (N.D.Okl. 1947) 73 F.Supp. 156.

In addition to the basic rights of plaintiff in the 1917 contract for which it has given valuable consideration, other factors reflect the continuing interest of plaintiff in the contract and the injunction.

(b) Plaintiff's contract rights were not and are not mere adjuncts of, or a fragment of the goodwill relating to, ownership rights in the trade-mark "Sun-Kist."

The trial court found that when plaintiff sold its rights in the trade-mark "Sun-Kist" it did not assign its rights under the 1917 contract or the injunctive decree (Finding

6; R. 110). In the face of this adverse finding of fact, defendant nevertheless argues that plaintiff necessarily abandoned or transferred its contract rights with the trade-mark rights (Op.Br. 10-14). This contention assumes, contrary to the facts, that the 1917 contract was a mere ancillary covenant, or mere part of the goodwill, attached to plaintiff's rights in the trade-mark "Sun-Kist." In fact, there was no concurrent transfer of the "Sun-Kist" mark at the time the contract was made. As far as continuing business interests are concerned, plaintiff has been engaged in the packing of fruits and vegetables since prior to 1917 right down to date. The trial court properly found that the contract, a compromise agreement resolving disputed business claims, remained unaffected by subsequent sale of plaintiff's rights in one trade-mark (Findings 1, 4, 5, 8; R. 109-110).

Defendant is, again, fighting the facts. And see, on the law, *Bowdil Company v. Central Mine Equipment Company* (8 Cir. 1954) 216 F.2d 156, 159-160, certiorari denied (1955) 348 U.S. 936.

(c) The 1917 contract was not and is not an illegal restraint of trade.

Defendant also argues that the 1917 contract has become⁴ an illegal restraint of trade—a "restrictive covenant" limiting use of the "Sun-Maid" mark to raisin products, no longer ancillary to a lawful "main purpose" of the contract, which purpose according to defendant was

⁴Defendant concedes that the contract was valid when made, and at the time this Court enforced it by ordering entry of the injunction herein (Op.Br. 7-8).

protection of plaintiff's rights in the trade-mark "Sun-Kist" (Op.Br. 18-21). This argument is untenable for several reasons.

The 1917 contract divested defendant's predecessor of any rights in the trade-mark "Sun-Maid" except as used on raisin products. Such definition of property rights was part of a settlement agreement and was not ancillary to any sale of rights in the trade-mark "Sun-Kist" or other property. Defendant was not and is not subject to a "restrictive covenant"; the plain fact is that defendant never owned or acquired the trade-mark "Sun-Maid" except for use on raisin products.

The 1917 contract was not and is not an illegal restraint of trade for the further reason that it does not prevent defendant from selling its products in any competitive field.⁵ The trial court found (Finding 10; R. 111):

"There is no evidence that the contract of March 10, 1917, or the injunctive decree of June 15, 1936, has foreclosed defendant from selling its products or any of them in any market, or that there is any lack of competition in the production and sale of fruit and vegetable products."

The only effect of the agreement is to define defendant's ownership rights in one trade-mark, leaving defendant wholly free to sell whatever products it chooses under any other name or mark to which it is lawfully entitled.

⁵This Court previously rejected the "illegal restraint" defense to enforcement of the contract, originally offered by defendant in its answer to the complaint herein (R. 59), when it directed entry of the injunction.

As the trial court stated in its opinion (165 F.Supp. 250-251):

“Even when the right to trade is limited, there is no anti-trust violation in an agreement unless it result in an unreasonable restraint. [Citing authorities.]

So, even if the agreement of March 10, 1917, had the effect of preventing Sun-Maid's predecessor, and consequently Sun-Maid, from engaging in the production and marketing of products other than raisins and raisin products, the monopolistic feature would not be a violation of law or public policy without an actual showing that there were no others in the field engaging in the production and sale of products competitive to those of the plaintiff. However, the agreement is much narrower. It *does not* prevent Sun-Maid from engaging in the production of canned products of fruits and vegetables other than raisin and raisin products. It merely *restricts* the use of the trademark Sun-Maid to such products. Sun-Maid's predecessor *was free*, and Sun-Maid itself *has been free* all these years, to can anything,—vegetables or fruits,—and *market them* under any name so long as that name is not Sun-Maid” (emphasis by the court).

The cases relied upon by defendant (Op.Br. 19-20) all concern ancillary covenants which *prevented all subsequent competition* between the agreeing parties. The contract in question patently does not prevent defendant from selling goods in competition with those of plaintiff or of anyone else; there is no evidence in this record that the limitation upon defendant's use of a particular trade-mark has foreclosed it from any market. The legality of contracts which merely limit use of a trade name and do not

otherwise restrict competition between the parties is well established.

- Chester H. Roth, Inc. v. Esquire, Inc.* (2 Cir. 1951) 186 F.2d 11, certiorari denied (1951) 341 U.S. 921;
- E. F. Prichard Co. v. Consumers Brewing Co.* (6 Cir. 1943) 136 F.2d 512, 522, certiorari denied (1943) 321 U.S. 763;
- California Fruit Growers Exch. v. Windsor Beverages* (7 Cir. 1941) 118 F.2d 149;
- John Rissman & Son v. Gordon & Ferguson* (D. Minn. 1948) 78 F.Supp. 195;
- Guth v. Guth Chocolate Co.* (4 Cir. 1915) 224 Fed. 932, affirming (D.Md. 1914) 215 Fed. 750, certiorari denied (1915) 239 U.S. 640;
- Kellogg v. Kellogg Toasted Corn Flake Co.* (1940) 212 Mich. 95, 180 N.W. 397, 402;
- Frazer v. Frazer Lubricator Co.* (1887) 121 Ill. 747, 13 N.E. 639;
- Probasco v. Bouyon* (1876) 1 Mo.App. 241;
- Waukesha H. M. Springs Co. v. Hygeia S. D. Water Co.* (7 Cir. 1894) 63 Fed. 438;
- Hamilton, Brown Shoe Co. v. Sam B. Wolf Sons Co.* (Ct.Cust.&Pat.App. 1930) 39 F.2d 272.

In *Probasco v. Bouyon*, supra, the court granted an injunction restraining defendant Oakes, who had sold his trade name together with a candy manufacturing business, from using the name in connection with a new candy-making venture. The court said (p. 246):

“A court of equity will restrain a breach of contract or of covenant, and to do so in this case will

not be against public policy or in restraint of trade. *Oakes may still make and sell candy, but not under the name the use of which he has for this purpose sold.*”

In the *Guth* case, supra, on similar facts the Fourth Circuit affirmed the granting of an injunction restraining defendant's use of a trade name with which he had parted. The court said (224 Fed. 934):

“When, in 1909, Guth sold, among other things, ‘the use of the name Guth for the purpose of manufacturing and selling candies under the Guth label,’ he dispossessed himself of the right thereafter to use his name as a trade-mark, and no valid reason appears for not holding him to his obligation. * * * *Stripped of all pretenses, what he really seeks to do is to keep for himself the essential thing he sold, and also keep the price he got for it.*”

As in the *Guth* case, defendant's only real complaint is that the injunction compels it to live up to the bargain by which it is bound. Defendant wants to retain the consideration received under the contract, and at the same time claim rights in the “Sun-Maid” mark in violation of the express terms of the contract.

As the trial court found (Finding 11; R. 111):

“The effect on defendant of the injunctive decree of June 15, 1936, has not changed since its entry; today as in 1936 the injunction merely enforces the contract of March 10, 1917, and the limited ownership rights of defendant in the ‘Sun-Maid’ trade-mark for use on raisins and raisin products only.”

An injunction which merely enforces a contract between experienced business men relating to rights in a single

trade-mark is not equitably subject to dissolution (see *United States v. Swift & Co.* (1932) 286 U.S. 106, 115; *Hughes Tool Co. v. A. F. Spengler Co.* (W.D.Okl. 1947) 73 F.Supp. 156). The trial court succinctly observed (165 F.Supp. 255):

“On the contrary, *it would be inequitable*, at the present time, when no other conditions exist, to relieve the defendant of the binding effect of its predecessor’s contract” (emphasis by the court).

C. THE TRIAL COURT CORRECTLY HELD THAT JOINDER OF SUNKIST GROWERS, INC., AS A PARTY TO THIS PROCEEDING WAS NOT NECESSARY OR DESIRABLE.

For all the reasons previously stated, plaintiff’s continuing rights under the 1917 contract—which it did not assign to Sunkist Growers in 1950 when it assigned its rights in the trade-mark “Sun-Kist”—make plaintiff the proper party to oppose dissolution of the injunction which protects its contract rights. In the trial court plaintiff neither urged nor opposed joinder of Sunkist Growers, taking the position that in any event plaintiff was entitled to continuance of the injunction. The least that can be said is that the trial court was within its discretion in determining that under the circumstances Sunkist Growers was not a necessary or proper party to this proceeding (Finding 14, Conclusion 4; R. 111-112). The trial court commented (165 F.Supp. 256):

“Nor would it be fair to substitute a new party-plaintiff,—Sun-Kist Growers, Inc.,—which was not a party to the original litigation, and relitigate a judgment which has been final for over twenty years.”

It may, however, be pertinent to note that dissolution of the injunctive decree would also adversely affect the interests of Sunkist Growers. It is well settled that intervening equities and the interests of third persons and of the public may be considered in determining any requested modification of an injunctive decree (7 Moore's Federal Practice, p. 225; Restatement, Torts, sec. 942).

Sunkist Growers acquired plaintiff's rights in the trademark "Sun-Kist" in 1950 for \$1,250,000 (R. 171-178). Contrary to defendant's assertions of lack of interest by Sunkist Growers (Op.Br. 26), the record demonstrates that Sunkist Growers is manifestly interested in plaintiff's protection of the 1917 contract and the injunctive decree. F. R. Wilcox, general manager of Sunkist Growers, testified (R. 153-154):

"Q. Since the acquisition of the rights under the 1950 agreement has Sunkist Growers increased and expanded its use of the Sunkist mark?

A. Oh, yes.

Q. That increased use of the Sunkist mark has been on what products?

A. It has been on what we call or normally classify as citrus products which includes a large range of products that are normally made from citrus fruits.

Q. It includes canned products? A. Yes.

Q. Prior to 1950 did Sunkist Growers use the mark on canned products? A. No.

Q. You stated a moment ago that the existence of the injunction which Calpack had against Sun-Maid was taken into consideration by Sunkist Growers in making the 1950 purchase of rights. Has there been any circumstance which has occurred since 1950 up to the present time which has eliminated the significance of the injunction to Sunkist Growers?

A. No. Not that I can think of, sir.

Q. In that connection circumstances have stayed the same from 1950 until today?

A. Yes. The only change has been the one we have referred to earlier which is the extension of the use of the trade-mark by Sunkist since that time.

May I state also that that extension of the use of the trade-mark has not only been domestic but also in foreign markets as well where we have registered four products in a number of foreign markets, both actual markets and potential markets.

Q. As general manager of Sunkist Growers would you want to see the Sun-Maid mark used on citrus products? A. No.

Q. Do you feel there might be elements of confusion or possibly impairment of Sunkist sales position in such usage? A. Yes."

Thus, in addition to all other circumstances, there is the threat of trade-mark confusion and unfair competition, with detriment to the intervening interests of Sunkist Growers and to the public, if the injunction were now to be set aside.

CONCLUSION.

The injunctive decree herein, originally entered pursuant to the mandate of this Court, upheld the validity of the 1917 contract, settled defendant's limited ownership rights in the trade-mark "Sun-Maid" for use on raisin products only, and permanently enjoined defendant from using the trade-mark on other products. Defendant has now seized upon an irrelevant circumstance as an excuse to renew its efforts to claim rights of ownership in the

trade-mark "Sun-Maid" beyond those it initially acquired from its predecessor, and beyond those established by the prior decisions of this Court and the Court of Customs and Patent Appeals. Defendant has failed to show that continued obedience to its contractual obligations and to the injunctive decree is oppressive or even unfair. On the contrary, as the trial court found, destruction of plaintiff's contract rights would be inequitable. The trial court properly refused to permit defendant to relitigate issues settled adversely to its contentions, and to evade a contract heretofore held binding upon it.

Plaintiff respectfully submits that the order of the district court denying dissolution of the injunctive decree should be affirmed.

Dated, April 30, 1959.

MARSHALL P. MADISON,
JAMES MICHAEL,
GEORGE A. SEARS,
*Attorneys for Appellee California
Packing Corporation.*

PILLSBURY, MADISON & SUTRO,
Of Counsel.

No. 16223

United States
Court of Appeals
for the Ninth Circuit

SUN-MAID RAISIN GROWERS OF CALIFORNIA, a Corporation,

Appellant,

vs.

CALIFORNIA PACKING CORPORATION, a Corporation,

Appellee.

Supplemental
Transcript of Record

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Southern District of California
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FILED

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Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Northern Division.



**EXHIBITS ATTACHED TO DEPOSITION OF
CHARLES GRIFFIN, JR.**

DEFENDANT'S EXHIBIT No. 1

Resolved that Ralph Brown, the senior vice president, and N. A. Hollister, the secretary of this corporation, be and each of them is hereby authorized and directed to execute and attest on behalf of this corporation and in its name the form of agreement attached hereto between this corporation and California Fruit Growers Exchange.

I hereby certify that the above is a full, true, and correct copy of the resolution passed by the Executive Committee of the Board of Directors of California Packing Corporation at its meeting on Monday, September 18, 1950, and the same is in full force and effect and has not been revoked.

I further certify that the bylaws of said California Packing Corporation expressly provide that during the intervals between the meetings of the Board of Directors of said corporation, said Executive Committee of the Board of Directors shall possess and may exercise all the powers of said Board of Directors in the management and direction of the operations of said corporation.

In Witness Whereof I have hereunto set my hand and affixed the seal of this corporation this 18th day of September, 1950.

/s/ N. A. HOLLISTER,
Secretary.

Resolved, that H. A. Lynn the president, and Paul S. Armstrong the secretary of this corporation, be and each of them is hereby authorized and directed to execute and attest on behalf of this corporation and in its name the form of agreement attached hereto between this corporation and California Packing Corporation.

I hereby certify that the above is a full, true and correct copy of the resolution duly passed by the board of directors of California Fruit Growers Exchange at a regular meeting thereof duly and regularly convened and held on Wednesday, September 20, 1950, and that the said resolution is in full force and effect and has not been revoked.

In Witness Whereof, I have hereunto set my hand and affixed the seal of this corporation this 20th day of September, 1950.

[Seal] /s/ PAUL S. ARMSTRONG,
Secretary.

This Agreement, dated this 20th day of September, 1950, by and between California Packing Corporation, a New York corporation, with its principal office and place of business in the City and County of San Francisco, State of California, hereinafter referred to as "Calpack," and California Fruit Growers Exchange, a California corporation, with its principal office and place of business in the City of Los Angeles, State of California, hereinafter referred to as "Exchange";

Witnesseth:

Recitals

(a) Whereas there is now in effect between the parties a written agreement dated October 7, 1915, a copy of which, marked "Exhibit A," is attached hereto and by reference incorporated as a part hereof, which relates to the ownership by Calpack of the trade-mark "Sun-Kist" with respect to certain products and the ownership by Exchange of the trade-mark "Sunkist" for certain other products; and

(b) Whereas it is the desire of the parties hereto that said written agreement Exhibit A be forthwith terminated; and

(c) Whereas Calpack has agreed to sell, transfer and assign all its right, title and interest in and to said trade-mark "Sun-Kist," together with that part of the good will of the business of Calpack connected with the use of and symbolized by the mark, but not the good will connected with the use of and symbolized by any other trade-mark used in its business, and all domestic and foreign registrations relating to said trade-mark, a list of such registrations being attached hereto marked "Exhibit B" and by reference incorporated as a part hereof, and Exchange has agreed to purchase the same:

Now, Therefore, in consideration of the premises and the mutual promises of the parties hereinafter set forth, the parties agree as follows:

1. Calpack hereby sells, assigns and transfers to Exchange its entire right, title and interest in and to the trade-mark "Sun-Kist" and registrations thereof, together with that part of the good will of the business of Calpack connected with the use of and symbolized by the mark, but not the good will connected with the use of and symbolized by any other trade-mark used in its business. In effectuation of this sale, assignment and transfer Calpack hereby agrees to make, execute and deliver an assignment in the form attached hereto and marked "Exhibit C," and such other individual assignments, in substantially the same form, as may be requested by Exchange, with such formal changes as may be required by the laws or regulations of the jurisdiction in which such assignment is to be recorded, transferring to Exchange each and every registration of the trade-mark "Sun-Kist," state, federal and foreign, in which Calpack has or purports to have an interest, including, but without limitation to, each and every of the registrations listed in the aforesaid Exhibit B. Said assignments shall be in proper form for recordation in the respective countries issuing said registrations in accordance with the respective laws of said countries.

All of the aforesaid shall be done at the sole cost and expense of Calpack and without cost or expense to Exchange.

2. Calpack covenants and agrees that from and after the date hereof, except as in this Article 2

permitted, it will not in any way or manner use the trade-mark "Sun-Kist" or any colorable imitation thereof, or any trade-mark incorporating the work "Kist" or any combination thereof, or any similar word, or any illustration having such implication, or any representation, in part or in whole, of a sunburst, in connection with the sale or distribution of any product, or in or upon any carton, box, label, circular, advertisement, sign, billhead or letterhead, or in any slogan.

Exchange agrees that Calpack shall have such time as may be necessary within which to complete the distribution of its products labeled, or to be labeled, under the "Sun-Kist" mark, packed from the 1950 or prior crops.

3. Calpack covenants and agrees that it will at any time subsequent to the date hereof, on request of Exchange or its duly authorized agent, deliver to Exchange up to fifty (50) copies of each and every available carton, box, label, circular, advertisement, sign, billhead, letterhead and slogan on which appears the trade-mark "Sun-Kist" or the word "Kist" or any combination thereof, or any illustration having such implication, or any representation, in part or in whole, of a sunburst.

Calpack further covenants and agrees that it will at any time after January 1, 1951, on demand of Exchange or its duly authorized agent, deliver to Exchange or destroy, as may be directed by Exchange or its duly authorized agent, all cartons,

boxes, labels, circulars, advertisements, signs, bill-heads, letterheads, plates, or any other material on which appears the trade-mark "Sun-Kist" or any colorable imitation thereof, or any trade-mark, or slogan incorporating the word "Kist" or any combination thereof, or any similar word, or any illustration having such implication, or any representation, in part or in whole, of a sunburst, except the goods referred to in the second paragraph of Article 2 hereof.

All of the aforesaid shall be without cost or expense to Exchange.

4. Calpack covenants and agrees that it will, at any and all times, upon the request of Exchange or its duly authorized agent, promptly deliver to Exchange the originals or, at Calpack's option, duly authenticated copies of all letters, correspondence, documents and agreements of every kind and character relating to the adoption of the trade-mark "Sun-Kist" and relating to all controversies and proceedings with others respecting the use of the trade-mark "Sun-Kist" or any colorable imitation thereof, or any trade-mark incorporating the word "Kist" or any combination thereof.

Calpack further covenants and agrees that it will, upon the request of Exchange or its duly authorized agent, promptly deliver to Exchange for its use each and every of its files respecting each and every suit, opposition or interference in which the trade-mark "Sun-Kist" was in any way involved or con-

cerned, and each and every of its files with respect to each and every registration and application for registration of the trade-mark "Sun-Kist," and each and every of its files respecting any abandonment by Calpack of or any failure to renew any registration of "Sun-Kist," or any cancellation proceedings respecting the same, and each and every of its files respecting the adoption and use of the trade-mark "Sun-Kist" or of any trade-mark or slogan in which the word "Kist" or any similar word or words, or illustrations having such implication, or any representation, in part or in whole, of a sunburst appears.

All of the same is to be furnished without cost or expense to Exchange.

5. Calpack covenants and agrees that it will, at the request of Exchange or its duly authorized agent, produce for use by Exchange all evidence and facts known, or which may become known to it relating to the adoption and use by Calpack and its predecessor of the trade-mark "Sun-Kist," and will produce such of its employees having knowledge of the facts, or having the custody or control of any evidence concerning the said adoption and use of the trade-mark "Sun-Kist," to testify respecting such facts in each and every interference and opposition and in each and every suit and proceeding in which said trade-mark "Sun-Kist" may now be or become involved or concerned.

All of the aforesaid to be done without cost or expense to Exchange other than reasonable cost of

travel, hotel and subsistence incurred by any employee of Calpack requested by Exchange.

6. Nothing herein contained shall in anywise be construed as a guarantee or warranty on the part of Calpack as to the validity of its trade-mark "Sun-Kist" or the registrations therefor or as requiring Calpack to transfer or convey any physical assets.

7. The said agreement of October 7, 1915, is hereby terminated, cancelled and of no further force or effect.

Each of the parties hereto does, for itself and for its successors and assigns, remise, release and forever discharge the other, its successors and assigns, and any and all of the officers, directors, agents, attorneys and employees, or any one of them, of and from all claims of every kind, nature and character whatsoever against the other arising directly or indirectly out of or connected with said agreement dated October 7, 1915.

8. Exchange covenants and agrees to pay Calpack the sum of one million two hundred fifty thousand dollars (\$1,250,000) in the following installments:

Two hundred fifty thousand dollars (\$250,000) on or before November 1, 1950;

Two hundred fifty thousand dollars (\$250,000) on November 1, 1951;

Two hundred fifty thousand dollars (\$250,000) on November 1, 1952;

Two hundred fifty thousand dollars (\$250,000) on November 1, 1953; and

Two hundred fifty thousand dollars (\$250,000) on November 1, 1954;

as and for the full purchase price and compensation for said trade-mark and the rights hereunder conferred and the termination of the agreement of October 7, 1915, and all of the conditions, rights and obligations of this agreement.

Deferred payments are not to bear interest.

In Witness Whereof, the parties hereto have duly executed this agreement by their respective officers thereunto authorized as of the day and year first hereinabove written.

[Seal]

CALIFORNIA PACKING
CORPORATION,

By /s/ RALPH BROWN,
Vice President.

Attest:

/s/ N. A. HOLLISTER,
Secretary.

CALIFORNIA FRUIT
GROWERS EXCHANGE,

By /s/ H. A. LYNN,
President.

Attest:

/s/ PAUL S. ARMSTRONG,
Secretary.

Exhibit A

Whereas, The J. K. Armsby Company, a corporation of the State of Illinois, has used "Sun-Kist" as its trade-mark in connection with goods of the class hereinafter referred to as "groceries," comprising dried fruits, raisins, canned goods and many other articles sold by wholesale grocery houses, but not perishable fresh fruit or citrus fruit by-products; and said Company has registered its said trade-mark in the United States Patent Office in connection with many of the goods upon which it has used the same as aforesaid;

And Whereas, the California Fruit Growers Exchange, a corporation of the State of California, has used "Sunkist" as its trade-mark in connection with perishable fresh fruit, and particularly citrus fruit, and registered the same in the United States Patent Office as its trade-mark for many of the goods aforesaid in connection with which it has used the same;

And Whereas, in connection with the application upon which registration was made by the California Fruit Growers Exchange the Commissioner of Patents decided in substance that no interference existed between the uses or registrations of the mark aforesaid and it now appears that for several years the uses of "Sunkist" aforesaid have both continued on a very extensive scale, embracing very large distribution, accompanied by very large expenditures by both parties in popularizing their respective goods without material conflict or misconception and with the result that when used in

connection with groceries "Sun-Kist" in fact now indicates in the trade and to the public that the goods are the goods of The J. K. Armsby Company and when used in connection with perishable fresh fruit "Sunkist" now indicates in the trade and to the public the goods of the Exchange;

And Whereas, the parties hereto desire to record their understanding and agreement concerning the uses of said trade-mark with a view to avoiding any and all differences or conflict.

Now, Therefore, This Memorandum Witnesseth, that The J. K. Armsby Company and the California Fruit Growers Exchange recognizing the facts aforesaid have agreed and hereby agree as follows:

1. The California Fruit Growers Exchange recognizes the exclusive right of The J. K. Armsby Company to use its said trade-mark "Sun-Kist" on dried fruits, raisins, canned goods and other articles ordinarily sold by wholesale grocery houses, but not upon perishable fresh fruit or the by-products of citrus fruits.

2. The J. K. Armsby Company recognizes the exclusive right of the California Fruit Growers Exchange to use its said trade-mark "Sunkist" on oranges, lemons, grapefruit and all other perishable fresh fruit and upon citrus fruit by-products.

3. The J. K. Armsby Company and California Fruit Growers Exchange will continue to use "Sunkist" only upon the highest grade and quality of their respective goods and each will endeavor by lawful means to prevent the use of "Sunkist" in connection with goods of low grade or inferior

quality, although the goods may not be identical in kind with the respective goods of the parties hereto, if the goods are of a kind such that confusion may arise concerning their origin, so as to impair the value of "Sunkist" as a trade-mark to either The J. K. Armsby Company or the California Fruit Growers Exchange.

It is understood and agreed that the provisions hereof shall be applicable to and govern the rights and acts of the parties in all markets and countries into which their goods are or may be shipped.

In Witness Whereof, each of said corporations has hereunto caused its corporate name to be subscribed and its corporate seal to be affixed by its President and Secretary thereunto duly authorized, all done as of this 7th day of October, 1915.

THE J. K. ARMSBY
COMPANY,
(A Corporation.)

By J. K. ARMSBY,
Its President.

By E. R. ARMSBY,
Its Secretary.

CALIFORNIA FRUIT
GROWERS EXCHANGE,
(A Corporation.)

By F. Q. STORY,
Its President.

By H. VAN VLECK,
Its Asst. Secretary.

EXHIBIT B

<u>COUNTRY</u>	<u>REG. NO.</u>	<u>DATE</u>	<u>EXPIRES</u>
*U. S. Trade Mark Registration	67,277	Jan. 28, 1908	Jan. 28, 1948
"	67,278	Jan. 28, 1908	Jan. 28, 1968
"	67,478	Feb. 4, 1908	Feb. 4, 1948
"	96,082	April 7, 1914	April 7, 1954
"	96,385	April 21, 1914	April 21, 1954
"	96,770	May 5, 1914	May 5, 1954
"	96,929	May 12, 1914	May 12, 1954
"	99,835	Sept. 22, 1914	Sept. 22, 1954
"	101,121	Nov. 17, 1914	Nov. 17, 1954
"	101,439	Dec. 15, 1914	Dec. 15, 1954
"	102,354	Feb. 9, 1915	Feb. 9, 1955
"	104,684	June 8, 1915	June 8, 1955
"	113,219	Oct. 10, 1916	Oct. 10, 1956
"	114,322	Dec. 12, 1916	Dec. 12, 1956
"	281,093	March 10, 1931	March 10, 1951
"	281,094	March 10, 1931	March 10, 1951
"	301,278	Feb. 21, 1933	Feb. 21, 1953
"	304,659	July 11, 1933	July 11, 1953
**U. S. Label Reg.	16,770	Feb. 4, 1913	
**	16,771	Feb. 4, 1913	
**	16,772	Feb. 4, 1913	
**	16,773	Feb. 4, 1913	
**	16,774	Feb. 4, 1913	
**	16,775	Feb. 4, 1913	
**	16,776	Feb. 4, 1913	
**	16,777	Feb. 4, 1913	
**	16,778	Feb. 4, 1913	
**	16,779	Feb. 4, 1913	
**	16,780	Feb. 4, 1913	
**	16,896	April 1, 1913	
**	16,897	April 1, 1913	
**	17,715	May 26, 1914	
**	17,751	June 2, 1914	
**	17,752	June 2, 1914	
**	17,753	June 2, 1914	
**	17,754	June 2, 1914	
California State Registration	5,047	May 9, 1911	
"	5,553	April 27, 1912	
"	6,003	March 5, 1913	
<u>Foreign Registrations</u>			
*Argentina	92,212	Sept. 21, 1925	Sept. 21, 1935
Australia	15,338	July 23, 1913	July 23, 1955
Austria	55,518	March 6, 1913	Being reinstated
Barbados	130	June 4, 1919	Unlimited
Belgium	46,240	Oct. 3, 1913	Unlimited
	(Renewal of)		
	(No. 18,145)		

COUNTRY	BEG. NO.	DATE	EXPIRES
*Bolivia	A-675 (Renewal of No. C-129)	June 26, 1919	June 23, 1939
***Burma	397/19	May 2, 1919	Unlimited
*Brazil	29,040 (Renewal of No. 4,349)	Nov. 9, 1914	Feb. 24, 1945
*Canada	79/19518	March 23, 1914	March 23, 1939
"	78/19184	Dec. 15, 1913	Dec. 15, 1953 or Dec. 15, 1963
"	90/21862	July 5, 1916	July 5, 1956 or July 5, 1966
"	184/40661	Oct. 2, 1926	Oct. 2, 1951
*Ceylon	2,034	Nov. 4, 1919	April 29, 1933
*Chile	37,911	June 11, 1926	June 11, 1936
* "	37,912	June 11, 1926	June 11, 1936
*China (Hong Kong)	120/1919	Aug. 20, 1919	April 15, 1933
China (Nanking)	13,123	Oct. 30, 1930	Oct. 29, 1950
China (Manchuria)	12		Unlimited
China (Shanghai)	C.H.15,604 Cons.1,823	Sept. 1914	Unlimited
China (Tientsin)	C.H. 273 Cons. 18	April 17, 1919	Unlimited
*Costa Rica	1,089	April 15, 1919	April 15, 1934
Cuba	33,059	Nov. 10, 1917	Nov. 9, 1962
Czechoslovakia	91,751	June 2, 1920	March 5, 1953
Denmark	219/1913	March 29, 1913	March 29, 1953
Dutch East Indies	26,302	Sept. 19, 1916	Aug. 13, 1956
*Egypt	262	Feb. 9, 1935	Feb. 9, 1945
***Federated Malay States		June 23, 1919	
Finland	11,278	Sept. 13, 1929	June 22, 1950 Being renewed
*Fiji Islands	1/140	Aug. 13, 1919	May 6, 1933
France	54,322	April 22, 1918	Dec. 17, 1962
***French Indo China		April 11, 1920	
		Dec. 30, 1930	
Germany	171,051	Dec. 22, 1917	Dec. 30, 1942 Being renewed
Great Britain	374,638	May 22, 1917	Sept. 8, 1958
" "	547,364	March 21, 1934	Dec. 30, 1961
*Guatemala	1,740	Feb. 15, 1922	Feb. 15, 1932
* "	1,741	Feb. 15, 1922	Feb. 15, 1932
*India	1,051	Sept. 26, 1918	New appl'n. filed
"	Appl'n. 141,062	Jan. 11, 1950	Being processed
*Upper India	110/19	April 28, 1919	New appl'n. filed
Ireland	43,365	Feb. 26, 1934	June 3, 1961
Italy	85,610	Nov. 21, 1913	Sept. 29, 1963
Japan (Korea)	105,374	July 14, 1919	July 14, 1959
Japan	186,707	Nov. 22, 1926	Being reinstated and renewed
"	186,811	Nov. 26, 1926	Being reinstated and renewed
*Jugoslavia	602	Oct. 3, 1921	Oct. 3, 1941
*Mexico	16,368	March 25, 1919	March 17, 1939
Netherlands	65,252	Sept. 1, 1933	Sept. 1, 1953
Newfoundland	743	March 7, 1919	Unlimited
*Nicaragua	2,050	Dec. 9, 1929	Dec. 9, 1939
Norway	28,322	April 15, 1940	April 14, 1960
Pakistan	Appl'n. 9,364	Dec. 31, 1949	Being processed
*Panama	732	March 9, 1921	March 9, 1941
*Peru	666 (266/19)	June 10, 1919	Sept. 4, 1939
*Philippines	1,661	Oct. 16, 1914	Oct. 16, 1944
Philippines	Serial 827	Nov. 26, 1948	Being processed

<u>COUNTRY</u>	<u>REG. NO.</u>	<u>DATE</u>	<u>EXPIRES</u>
*Poland	8,655	Oct. 5, 1925	Oct. 5, 1935
* "	9,567	Nov. 9, 1925	Nov. 9, 1935
*Porto Rico	1,118	April 8, 1921	April 8, 1941
*Portugal	25,718	July 13, 1922	July 13, 1932
* "	25,719	July 13, 1922	July 13, 1932
* "	27,811	July 19, 1922	July 19, 1932
* "	28,947	April 12, 1923	April 12, 1933
*Salvador	542	Oct. 24, 1919	Oct. 24, 1934
*Santo Domingo	661	May 24, 1919	May 24, 1929
*Siam	A-81	Feb. 2, 1932	Oct. 1, 1941
*South Africa	378/1919	April 6, 1920	
***Straits Settlements		May 30, 1919	
Sweden	43,976	Oct. 16, 1913	Sept. 17, 1954
Switzerland	98,682	Sept. 20, 1940	Sept. 20, 1960
*Uruguay	21,514	Nov. 22, 1920	Nov. 21, 1940
	(Renewal of No. 9,814)		
*Venezuela	2,640	Oct. 15, 1919	Oct. 15, 1939

*Expired registration.

**Label copyright in name of The J. K. Armsby Co.

***Publication of claim of ownership rather than a registration.

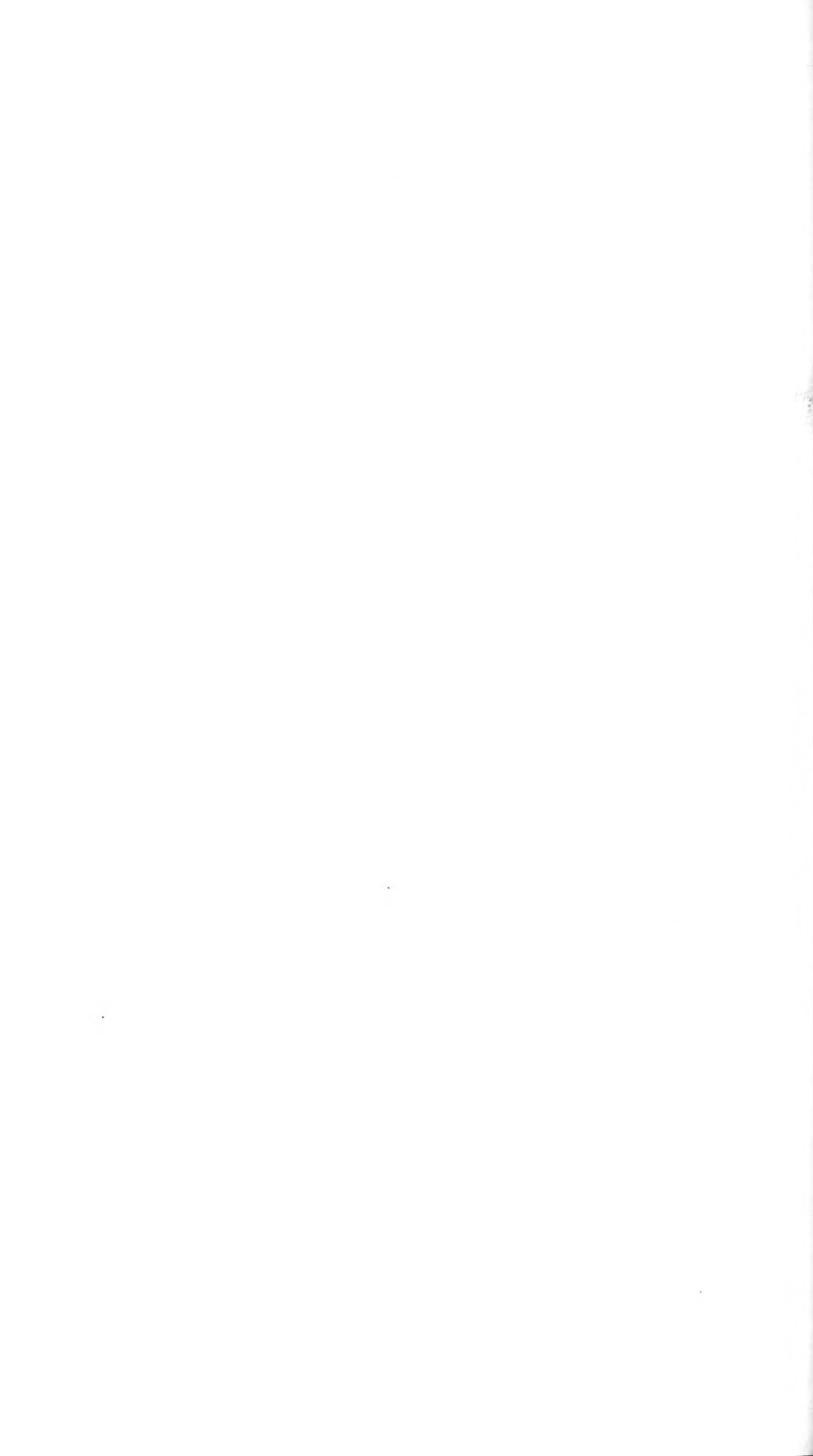


EXHIBIT C

Calpack hereby sells, assigns and transfers to Exchange its entire right, title and interest in and to the trade-mark "Sun-Kist" and the registration thereof, No., together with that part of the good will of the business of Calpack connected with the use of and symbolized by the mark, but not the good will connected with the use of and symbolized by any other trade-mark used in its business.

[Endorsed]: Filed February 3, 1955.



No. 16,223

IN THE

United States Court of Appeals
For the Ninth Circuit

SUN-MAID RAISIN GROWERS OF CALIFORNIA, a corporation,	}	<i>Appellant,</i>
VS.		
CALIFORNIA PACKING CORPORATION, a corporation,	}	<i>Appellee.</i>

REPLY BRIEF FOR APPELLANT SUN-MAID.

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of California.*

FILED

MAY 25 1969

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No. 16,223

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SUN-MAID RAISIN GROWERS OF
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Appellant,

VS.

CALIFORNIA PACKING CORPORATION,
a corporation,

Appellee.

REPLY BRIEF FOR APPELLANT SUN-MAID.

INTRODUCTION.

Plaintiff repeatedly stresses, in its brief, that the circumstance of its sale of the trade-mark "Sun-Kist" is irrelevant (pages 3, 8 etc. Brief of Appellee), and that the continuance of the injunction does not depend upon its ownership of the trade-mark. Plaintiff further criticizes defendant's theories as being in the teeth of (a) the findings of fact of the district court, (b) the original decision of this court directing that the injunction issue, and (c) the prior decision of the Court of Customs and Patent Appeals respecting defendant's ownership in the trade-mark "Sun-Maid".

As to (a) above, defendant demonstrated in some detail in its opening brief why the lower court was in error in its findings of fact and conclusions of law. As to (b) and (c) above, it should be observed that those decisions were rendered long before the occurrence of that one allegedly "irrelevant circumstance" involving plaintiff's assignment of its trade-mark "Sun-Kist".

Plaintiff's brief only emphasizes the weakness of its position since the cases which it cites, hereinafter discussed, leave no room for doubt that ownership of the trade-mark "Sun-Kist" is essential to the maintenance of the present injunction.

**THIS COURT HAS POWER TO SET ASIDE
THE INJUNCTION.**

Plaintiff contends that since its predecessor and defendant's predecessor entered into a *contract* in 1917 which restricted defendant's use of "Sun-Maid", the injunction enforcing the contract became a final decree and thus divested this court of supervision regardless of changed conditions.

That this argument is devoid of merit is best illustrated by the case of *Coca-Cola Co. v. Standard Bottling Co.*, (10th Cir., 1934), 138 Fed. 788, previously cited by defendant at page 22 of its opening brief. In that case, a consent decree was entered against the defendant. Sixteen years after the decree was entered, defendant sought to have it modified on the ground that plaintiff, in the light of then recent court de-

cisions, no longer had the right to the exclusive use of the word "cola". The plaintiff argued, as does the plaintiff in the present case, that regardless of the fact that it no longer had the exclusive use of the word "cola", it could still prevent defendant from using it because the consent decree constituted a contract between the parties and could not thereafter be modified.

Although the consent decree in the *Coca-Cola* case imposed more restraints upon the defendant than the decree in the present case, the court did not hesitate to reject plaintiff Coca-Cola Company's contention.

As a result of the one changed circumstance in the *Coca-Cola* case (adjudications that plaintiff had no exclusive right to the word "cola" standing alone, or to any combination, except its own trade-mark of "Coca-Cola"), several other companies in the same area were using the trade-marks "Pepsi-Cola", "Cleo-Cola", etc. without fear of suit by plaintiff. Thus, the court pointed out, if the injunction were continued, plaintiff could stop defendant from using "Cherry Cola", but could do absolutely nothing to restrain others from using the generic word "cola". The court recognized the inequity of this situation and promptly modified the injunction as requested by defendant.

Since a contract and a consent decree have precisely the same legal effect (*Morris v. Patterson*, 105 S.E. 25, 180 N.C. 484; *Karnes v. Black*, 215 S.W. 191, 185 Ky. 410), it is obvious, in the light of the *Coca-Cola* case, that this court is not deprived of its supervisory jurisdiction. There is simply no intelligent reason

for distinguishing between a contract embodied in a judgment (consent decree) and a contract which is enforced by an injunction, as in the case at bar.

**PLAINTIFF'S SALE OF ITS TRADEMARK IS A DRASTIC
CHANGE IN CIRCUMSTANCES, SUFFICIENT TO WARRANT
DISSOLUTION OF THE INJUNCTION.**

Plaintiff attempts to urge upon this court the curious hypothesis that the changing of only *one* circumstance surrounding the issuance of an injunction is not worth the court's consideration in deciding whether or not to dissolve such injunction (Brief of Appellee, pages 8, 12, 15 et seq.).

Obviously, when plaintiff divested itself of all "right, title and interest" in its trade-mark, together with the good will connected with its use (R. 173) there was only one integrated transaction, but it constituted an all-controlling change of circumstances, justifying the dissolution of an injunction, the sole object of which was to protect plaintiff's trade-mark. It takes no torturing of the facts, to appreciate that a continued enforcement of the injunction will only lead to the anomalous situation condemned in the *Coca-Cola* case, *supra*, i.e., plaintiff herein can prevent defendant from using the mark "Sun-Maid" on certain products, but it has no standing whatsoever to stop anyone else from using "Sun-Maid" on those products. Nor, for that matter, could plaintiff prevent anyone from using the mark "Sun-Kist" itself.

Therefore, it appears that a decree of a court of equity is now being used by plaintiff as an instrument of legal blackmail, and not to protect a valid interest of plaintiff.

PLAINTIFF CAN HAVE NO RIGHTS IN THE CONTRACT OF 1917 WHICH WAS A PART OF THE GOODWILL ATTACHED TO THE TRADEMARK "SUN-KIST".

It is surprising that plaintiff persists in urging the naive argument that this court may disregard the subject matter of the 1917 contract (page 19 Appellee's Brief).

Plaintiff quotes from a statement of the district court (165 F.Supp. 255, n. 1) to the effect that had plaintiff's predecessor, *without possessing any mark of its own*, entered into an agreement with defendant's predecessor, the contract would be just as effective. With all due respect for the district court, it must be stated that such a proposition is manifestly unsound. Had plaintiff not owned "Sun-Kist" in 1917, the agreement would not only have been a clear-cut invalid restraint on trade, but it would also have violated the rule that personal property (a trademark is personal property) cannot be "clogged with a servitude" unless there is some reasonable justification for it. *Hartford Charge-Pl. Assoc. v. Youth Centre-C. Stores*, (2 Cir. 1954) 215 F.2d 668, 670; *RCA Mfg. Co. v. Whiteman*, (2 Cir. 1940) 114 F.2d 86, 89; *Granz v. Harris*, (2 Cir. 1952) 198 F.2d 585, 587.

To adopt the reasoning of the district court would be to impeach the sanity of the directors and officers of defendant's predecessor. It is inconceivable that businessmen would gather together in a conference room and arbitrarily agree with a competitor to limit the use of a valuable trade-mark unless that competitor had some valid means of coercion at the time. It also seems most unlikely that plaintiff's predecessor would have been willing to pay any consideration to defendant's predecessor for its promise to restrict its mark unless plaintiff's predecessor had some interest to protect thereby.

The record reveals that, in truth, the original litigation, the contract, and the injunction all stemmed from plaintiff's fear that the mark "Sun-Maid" was likely to be confused with "Sun-Kist". The contract of 1917 is unequivocal and recites in plain English that the use of "Sun-Maid" was believed to be detrimental to plaintiff's predecessor's use (R. 16).

Thus, the contract itself makes it obvious that it was entered into by businessmen in their right minds, and that their purpose was to preclude what they considered a possibility of trade-mark confusion *in the light of the law as it existed at that time*.

**PLAINTIFF HAS NO RIGHTS TO PROTECT
BY THE INJUNCTION.**

Plaintiff further contends that the injunction should be continued in order to protect its so-called rights in the 1917 contract.

As indicated above, the record makes it plain that this contract was entered into and designed for the sole purpose of protecting plaintiff's trade-mark from confusion with defendant's. This court may then inquire as to what contract rights plaintiff has left to protect. It is no longer in danger of having the mark "Sun-Kist" infringed by anybody, therefore what right can it have in a contract and injunction designed to protect that mark? The court may also ask itself what benefits defendant is now receiving under the contract (page 24 Brief of Appellee). How can benefits still flow from plaintiff's promise that it will not sue defendant as long as defendant confines its mark to certain products? The answer is that plaintiff's promise is completely valueless to everyone in the world, including defendant, because plaintiff has no right or duty to protect "Sun-Kist".

Hughes Tool Co. v. A. F. Spengler Co., (N.D. Okl., 1947) 73 F.Supp. 156, relied on by plaintiff, does not in any way support its theory that the 1917 contract must be enforced without regard to its purpose. In the *Hughes* case, the parties agreed by contract to compromise a patent infringement dispute. An injunction subsequently issued to enforce the contract. Upon expiration of the patents, defendant sought to dissolve the injunction. The court continued the injunction, pointing out at page 157 that the patents covering the manufactured articles were not the prime elements of the contract since defendant had sold "*the good will of a business and agreed for a period of time to refrain from engaging again in that business in a*

certain territory.” This case is then exactly the type of case cited by defendant in its opening brief at page 17 and which plaintiff criticizes as not being in point (page 25 et seq. Brief of Appellee). Suppose in the *Hughes* case that the plaintiff had sold his business, *which he did not in fact do*. Upon the authority of any one of defendant’s cases cited at pages 15-17 of its brief, the court in the *Hughes* case would have been obliged to dissolve the injunction since the plaintiff would have had no interest which he was entitled to have protected, *Burchell v. Capitol City Dairy, Inc.*, 163 S.E. 81, 82, 158 Va. 6.

Moreover, *Bowdil Company v. Central Mine Equipment Company*, (8 Cir. 1954) 216 F.2d 156, and the other cases cited by plaintiff on page 28 of its brief, emphasize that the 1917 contract here in controversy is of a type that is extremely common among people in the business world and that such contracts have a legitimate business purpose. Not one of plaintiff’s cases is authority for its contention that the 1917 contract could have effectively been made in a vacuum without consideration being given to its ownership of “Sun-Kist”. For example, in plaintiff’s case of *John Rissman & Son v. Gordon & Ferguson*, (D.Minn. 1948) 78 F.Supp. 195, 198, the court recognizes that these agreements eliminate unfair competition and public confusion and incidentally protect the public from deception, and “promote fair dealing between the parties involved.” Also, in plaintiff’s case of *Waukesha H. M. Springs Co. v. Hygeia S.D. Water Co.*, (7 Cir. 1894) 63 Fed. 438, 441, it was said:

“The contract does not create the trade-mark, but it is clear evidence of its purpose and elements. *Its provisions tend directly to the end for which the law of trade-marks has been evolved*, viz. for the protection of the public as well as the owner from imposition.—‘that one man is not allowed to offer his goods for sale, representing them to be the manufacture of another trader in the same commodity.’ (citing cases) This is the view in which complainant’s bill sets up the contract; and *the action is not in the nature of specific performance*, as the defendant’s contention would have it treated, *but is clearly for the enforcement of alleged trade-mark rights.*”

The italicized portion of the *Waukesha* opinion leaves no doubt that the only reason these trade-mark agreements will be enforced is to protect trade-mark rights. In not one of plaintiff’s cases does one find a plaintiff who has assigned his trade-mark, attempting to enforce the contract. See *E. F. Pritchard Co. v. Consumers Brewing Co.*, (6 Cir. 1943) 136 F.2d 512 (cited by plaintiff) where the court reviews the trade-mark law applicable to these agreements at page 518 [8, 9].

JOINDER OF SUNKIST GROWERS IS NOT ONLY NECESSARY AND DESIRABLE, BUT IT IS ESSENTIAL TO THE MAINTENANCE OF THE ACTION.

Defendant acknowledges that the facts of this case are unique and that it has proved impossible to find a precedent where the facts are exactly parallel; how-

ever, the principles of equity will be applied to new cases as they are presented, and "relief will not be withheld merely on the ground that no precedent can be found." *National Skee-Ball Co., Inc. v. Seyfried*, 158 A. 736 (New Jersey).

In borrowing from the law of real property defendant can, without "torturing the facts" in the least, present an analogy to the present case which forcefully demonstrates the correctness of its position that plaintiff is not a proper party to this litigation.

Suppose that A and B are neighbors. A owns Whiteacre and B owns Blackacre. A becomes worried that B or his assigns might open a saloon on Blackacre. B is also opposed to saloons. A and B then enter into an agreement whereby A agrees not to open a saloon on his property for a period of 15 years, and B also agrees not to open a saloon for a similar period. They record the agreement and recite therein that it shall be binding upon their heirs and assigns and that it shall run with the land. One year later B changes his views and decides to open a saloon. A promptly obtains an injunction to enforce the agreement. Five years later, A sells Whiteacre to C. B again opens a saloon on his property. C is indifferent and takes no action, but A upon hearing of B's activities, immediately undertakes to enforce the agreement.

With regard to the above situation, the Restatement of the Law of Property, Vol. V, Servitudes, Ch. 46, takes the view that:

“§549. Except as stated in §550, one entitled to the benefit of a promise respecting the use of land which is of such a character as to run with his land *ceases to be entitled to the benefit of the promise when he no longer has in the land an interest* with which the benefit of the promise runs.”

A comment on §549 reads, in part, as follows:

“When the benefit of a promise runs with land, the successor to an interest in the land becomes entitled to the benefit of the promise. He takes the place of his predecessor not merely with respect to the land, but also with respect to the promise. If the succession is complete with respect to the land, it is complete with respect to the promise. All the remedies for its enforcement formerly available to the predecessor become available to the successor and *none are longer available to the predecessor. . . .*”

In commenting on §550 (setting forth the rule where the original covenantor may sue after he has ceased to be an owner), we find the following language:

“A promise which is of such a character as to run with land of the beneficiary of the promise is ordinarily of little or no value to the beneficiary of the promise after he has ceased to have any interest in the land with which the promise runs. *Any damage he might suffer from its breach would be but nominal.* Hence, only in exceptional circumstances will he be deemed to have retained any rights on a promise which runs with land after his interest in the land with which it runs ceases. . . .”

See also *Los Angeles University v. Swarth*, (9 Cir. 1901) 107 Fed. 798, 804, 806; *Boyd v. Park Realty Corporation*, 111 A. 129, 130 [2]; *Anderson v. Larson*, 225 N.W. 902, 904 [3]; *Auerbacher v. Smith*, 92 A.2d 492, 495 [2]; 19 *ALR* 2d 1275, 1276; 14 *Am. Jur.*, Covenants, §310; 14 *Cal. Jur.* 2d, Covenants, §98; 21 *C.J.S.*, Covenants, §82(b).

Regardless of any intimation in the opinion of the district court (R. 97) that plaintiff is obligated to defend the interests of the assignee in the mark, such a statement is completely unfounded and not based upon the record. The contract by which plaintiff assigned the mark "Sun-Kist" to Sunkist Growers states, "Nothing herein contained shall in anywise be construed as a guarantee or warranty on the part of Calpack as to the validity of its trade-mark 'Sun-Kist' or the registrations therefor . . ." (R. 177). All that plaintiff agreed to do with respect to its assignee was to produce evidence and testify if "Sun-Kist" ever became involved in any litigation (R. 175, 176).

Plaintiff's contention that it has a right to maintain this injunction because its dissolution *might* adversely affect the interests of its assignee is untenable under any authority.

CONCLUSION.

Plaintiff has failed to cite a single authority to support its position that the injunction should remain in force regardless of the ownership of the

property which the injunction was designed to protect. In fact, the very cases cited by plaintiff completely uphold defendant's contention that the sole purpose of the contract was to protect trade-mark rights. Therefore, a continuance of the injunction is not justified for the following reasons:

1. The injunction now sought to be dissolved is based on an unenforceable contract and results in an inequitable hardship on defendant.

2. Plaintiff has no standing in this court because it was merely the beneficiary under a restrictive covenant designed to protect a trade-mark in which it has no present interest.

3. Having sold the trade-mark "Sun-Kist" and its associated goodwill for \$1,250,000.00, plaintiff cannot now lay claim to such goodwill, nor can it take advantage of a covenant made only for the benefit of the trade-mark and such goodwill.

Dated, San Francisco, California,

May 20, 1959.

Respectfully submitted,

BOYKEN, MOHLER & WOOD,

GORDON WOOD,

*Attorneys for Appellant Sun-Maid
Raisin Growers of California.*



No. 16,223

United States Court of Appeals
For the Ninth Circuit

SUN-MAID RAISIN GROWERS OF CALIFORNIA, a corporation,	}	<i>Appellant,</i>
VS.		
CALIFORNIA PACKING CORPORATION, a corporation,	}	<i>Appellee.</i>

OPENING BRIEF FOR APPELLANT SUN-MAID.

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Sun-Maid Raisin Growers of California.*

FILED

MAR 30 1959

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**United States Court of Appeals
For the Ninth Circuit**

SUN-MAID RAISIN GROWERS OF
CALIFORNIA, a corporation,
Appellant,

vs.

CALIFORNIA PACKING CORPORATION,
a corporation,
Appellee.

OPENING BRIEF FOR APPELLANT SUN-MAID.

INTRODUCTION.

This is an appeal from an order of the United States District Court for the Southern District of California, dated July 25, 1958 (R. 112), denying appellant's motion to dissolve an injunction or, in the alternative, to join Sunkist Growers, Inc. as a party. The injunction sought to be dissolved was granted by the District Court over twenty years ago on June 15, 1936, against appellant, Sun-Maid Raisin Growers of California (hereinafter referred to as "defendant"), in favor of appellee (hereinafter referred to as "plaintiff").

JURISDICTION.

Jurisdiction in the District Court was present because it issued the injunction sought to be dissolved,

United States v. Swift and Co., 286 U.S. 106, 52 S. Ct. 460.

This court has appellate jurisdiction under 28 U.S.C. §§ 1291 and 1292 (1) which provide that the courts of appeal shall have jurisdiction of appeals from all final decisions and interlocutory orders refusing to dissolve injunctions of the district courts of the United States; and also under *Jackson v. Heiser* (C.A. 9th, 1940) 111 F. 2d 310, 312.

The basis for the motion was the general power of the equity courts to relieve a person of the effect of an injunction if conditions have changed, and the direct provision of subdivision (b) (5) of Rule 60 of the Federal Rules of Civil Procedure which authorizes the court to relieve a person from a final judgment when "it is no longer equitable that the judgment should have prospective application . . ."

STATEMENT OF THE CASE.

On June 15, 1915, plaintiff's predecessor instituted an action in the United States District Court for the Southern District of New York against defendant's predecessor (R. 8) complaining that the mark "Sun-Maid" was an infringement of its mark "Sun-Kist." (R. 8.) The action was settled by an agreement whereby defendant's predecessor covenanted to limit its use of the trademark "Sun-Maid" to raisins and raisin products. (R. 18.) This agreement specifically recited that defendant's predecessor's use of the mark "Sun-Maid" was detrimental to plaintiff's predecessor

because it “was and is mistaken for and confused with the trade-mark ‘Sun-Kist’.” (R. 16.)

In 1923, defendant’s predecessor was adjudicated a bankrupt and defendant corporation was organized for the purpose of taking over its packing business. (R. 10 and 11.)

In 1929 plaintiff instituted an action in the District Court claiming that defendant had violated the agreement of March 10, 1917. (R. 12.) The court found generally in favor of defendant, *California Packing Corp. v. Sun-Maid Raisin Growers of California*, 1934, D.C. Cal., 7 F. Supp. 497, and Finding No. 16 (R. 71) was as follows:

“Defendant in this case has not acted fraudulently and is not seeking to take advantage of complainant’s reputation or the reputation of its ‘Sun-Kist’ goods. Defendant is acting in good faith and *there is no confusing similarity between the two trade-marks in suit.* The use by defendant of the trade-mark ‘Sun Maid’ is not likely to, and does not, produce any confusion or mistake, or represent directly or indirectly that defendant’s goods come from complainant.”*

The decision of the District Court was reversed (81 F.2d 674) on the ground that defendant was bound by the contract of March 10, 1917 (81 F.2d 674, 676); however, Finding No. 16 was not disturbed on the appeal. Thus, the issue of confusing similarity of the two marks is not present in this case having been previously disposed of adversely to plaintiff.

*All italics are supplied unless otherwise indicated.

On June 15, 1936, a mandatory injunction was issued enjoining defendants from using the trademark "Sun-Maid" otherwise than on packages containing raisins or raisin products. (R. 80.)

On September 20, 1950, plaintiff sold all of its right, title and interest in its trademark "Sun-Kist" to California Fruit Growers Exchange (now by change of name called Sunkist Growers, Inc.).

On December 16, 1954, defendant filed a motion identical to the present one requesting dissolution of the injunction. The District Court declines to rule on the merits and dismissed the motion for failure to comply with the requirement that a proceeding to affect a final judgment should be addressed in the first instance, to the Court of Appeals which had ordered the judgment entered. An appeal from that order was taken and on January 16, 1957, the Court of Appeals dismissed the appeal as not being from a final order, but considered the proceeding before it as a request for permission to proceed in the District Court, and granted it, *Sun-Maid Raisin Growers of California v. California Packing Corp.*, 244 F.2d 895.

The District Court subsequently denied defendant's motion (165 F. Supp. 245) holding that the contract and injunction were still enforceable by plaintiff in spite of its having assigned its rights under the trademark "Sun-Kist."

SPECIFICATION OF ERRORS.

1. The District Court was in error in finding that:

a. The injunction was not based upon plaintiff's rights of ownership in the trademark "Sun-Kist" (Finding of Fact No. 4, R. 110);

b. The validity of the contract of March 10, 1917, did not depend upon plaintiff's ownership of the trademark "Sun-Kist" (Finding of Fact No. 5, R. 110);

c. Plaintiff's sale of the trademark "Sun-Kist" did not terminate its rights under the contract (Finding of Fact No. 8, R. 110);

d. There has been no change of circumstances relating to the validity or enforceability of the contract or injunction (Finding of Fact No. 9, R. 110, 111);

e. The injunction is not subject to change because it enforces a contract (Finding of Fact No. 11, R. 111); and

f. It would be inequitable to relieve defendant of the injunction (Finding No. 13, R. 111).

2. The District Court was in error in concluding that:

a. The contract of March 10, 1917, is not an unreasonable restraint of trade (Conclusion of Law No. 1, R. 112);

b. The contract of March 10, 1917, is valid and enforceable by plaintiff (Conclusion of Law No. 2, R. 112);

c. There is no basis for dissolution of the injunction (Conclusion of Law No. 3, R. 112) and

d. Sunkist Growers, Inc., is not a necessary or proper party herein. (Conclusion of Law No. 4, R. 112.)

3. Accordingly, the District Court erred in denying defendant's motions to dissolve the injunction and join Sunkist Growers, Inc. as a party. (R. 112.)

QUESTION PRESENTED.

The basic question involved here is whether an assignor of a trademark is entitled to oppose a motion to dissolve an injunction which originally issued to protect that assignor's interest in the trademark.

ARGUMENT.

I. THE SOLE PURPOSE OF THE INJUNCTION SOUGHT TO BE DISSOLVED WAS TO PROTECT PLAINTIFF'S THEN EXISTING RIGHTS IN ITS TRADEMARK "SUN-KIST".

It is apparently the position of the District Court that plaintiff derived a vested right in the injunction of June 15, 1936, simply because that injunction enforced a contract; and that once the contract was so enforced the *purpose* of the injunction became forever immaterial. (Finding of Fact No. 4, R. 110; and R. 98, 102, 103.)

It is pertinent to note that the injunctive decree of 1936 (R. 77) in this case makes absolutely no mention of any contract, but merely orders that defendant be perpetually enjoined from "using the trademark 'Sun-Maid' otherwise than on packages containing

raisins or on packages containing food products or confections made wholly or in part from raisins.” (R. 78.) However, the fact is that when this injunction was issued it enforced a covenant by defendant to restrict its use of the trademark “Sun-Maid” to raisin products. (R. 18.) The reason for this restriction was the supposed confusing similarity between defendant’s mark “Sun-Maid” and plaintiff’s mark “Sun-Kist.” (R. 16.)

This covenant or agreement by defendant was thus a form of restraint on trade, the legality of which depended upon its reasonableness. (17 C.J.S. Contracts § 252, p. 635.) Its reasonableness, in turn, depended upon several factors, the most important of which was the requirement that it be ancillary to a lawful contract by which plaintiff acquired something which needed protection, *Super Maid Cook-Ware Corporation v. Hamil*, 50 F.2d 830, 831 [1-3]; 17 C.J.S. Contracts, § 246, page 629. The test, then is: Did defendant’s covenant afford a fair protection to the interests of plaintiff in favor of whom it was given? (17 C.J.S. Contracts, p. 630.) In applying this test to the contract at the time it was executed in 1917, it is possible to conclude that plaintiff, the then owner of “Sun-Kist”, had a legitimate interest to protect. Any real or supposed danger to that interest would clearly be the valid subject matter of a main contract to which defendant’s covenant not to use its mark “Sun-Maid” could be legally appended. This restraint was, therefore, probably valid *at the time the contract was entered into*, and its enforcement by the

injunction was within the jurisdiction of this court, but only so long as there was an interest of *plaintiff* to protect.

Is then the fact that the injunction issued to protect rights under a valid contract sufficient to give the injunction the same qualities as a judgment at law which cannot be impeached collaterally? The District Court's premise that it does simply cannot be sustained. (R. 101.) It is based upon a complete misconception of the injunctive decree.

Fundamentally, questions relating to the dissolution of an injunction must be approached through an understanding of the nature and effect of the decree, 28 Am. Jur., Injunctions § 314. Contrary to the seeming belief of the District Court in the present case, an injunction does not create or "confirm" rights. (Finding No. 11, R. 111, R. 102.) Its only function is to *protect* the rights of a plaintiff from injurious interference. *In its office of preventing injury, it does not confer a perpetual or vested right in the remedy, the law governing the injunction, or the effect of it, Ladner v. Siegel*, 148 A. 699, 703 [11] 298 Pa. 487. It is grossly incorrect to say that the plaintiff herein is entitled to the same measure of protection at all times and under all circumstances (*Illinois Cent. R. Co. v. Illinois Commerce Commission*, 56 N.E.2d 432, 439 [3-4], 387 Ill. 256) simply because it was the beneficiary of an injunction which protected its rights under a contract. Surely, the contract cannot merge into the injunction to endow the injunction with some mysterious, unchangeable quality.

A preventive injunction of the type here under review, although purporting on its face to be permanent, is, in its very essence, of an executory or continuing nature. It is "permanent" only to the extent that it continues to protect the interest of the party for whom it was issued, and it has uniformly been held that it is always subject, upon a proper showing, to dissolution by the court which rendered it. As pointed out by Justice Edmonds in *Sontag Chain Stores Co., Ltd. v. Superior Court*, 18 Cal. 2d 92, 94 [2] et seq. [113 P.2d 689], the inherent power of the court to vacate a decree of this nature,

"may be exercised either where there has been a change in the *controlling facts* upon which the injunction rested, or the law has been changed, modified or extended, or where the ends of justice would be served by modification."

In considering whether or not the injunction should be dissolved, the court must make its determination upon the showing as to facts *now existing*, just as though the injunction had never been entered, *Illinois Cent. R. Co. v. Illinois Commerce Commission*, supra, 56 N.E.2d 432, 440 (5), 387 Ill. 256. As will be discussed later in this brief, the contract of 1917, as well as the injunction, have now become an illegal restraint on trade, per se, if they are not connected with the trademark. Any attempt by plaintiff to detach them from the trademark results in their becoming a nullity.

Thus, even though defendant's covenant may have been reasonable and valid when made, it *now* appears

that its sole object has been accomplished. Plaintiff no longer having any rights in the trademark to protect, the injunctive decree has no proper purpose to uphold it and give it life, *Glantz v. Willow Supply*, 52 A.2d 346, 349 (12-15), 139 N.J.E. 523.

Continued enforcement of the present injunction makes the court granting it a party to an illegal restraint on trade because the restrictive covenant has now become the *primary* object of plaintiff; it is no longer *ancillary* to the previously lawful purpose of protecting plaintiff's interest in the trademark Sun-Kist.

Obviously the injunction in the present case, like any other injunction whether enforcing a contract or not, looks to the future and should be dissolved if its past justification ceases to exist, *Douglas v. City of Jeanette*, 319 U.S. 157, 63 S.Ct. 877.

II. WHEN PLAINTIFF ASSIGNED THE TRADEMARK "SUN-KIST", IT THEREBY ABANDONED ITS RIGHTS UNDER THE CONTRACT AND INJUNCTION WHETHER THAT WAS ITS INTENTION OR NOT.

Defendant agrees that the rules of trademark law relative to assignments as set forth in the District Court opinion (R. 95, 96) are absolutely correct as abstract principles, for it is well established that the owner of a trademark has a property right which he may assign to another. Transactions of this nature are every day occurrences. Significantly, however, the court has not stated the pertinent rules of trademark law which specifically apply to the facts of this case.

To understand why plaintiff's rights under the contract and injunction have been abandoned, one must consider the basic underlying principle that, although a trademark may be the subject of an assignment, it simply cannot exist in gross, that is, *it cannot be assigned separate and apart from the good will with which it is associated*, *Ph Schneider Brewing Co. v. Century Distilling Co.*, 107 F.2d 699, 703 (7); Nims, *Unfair Competition and Trade-Marks*, 1947, § 17, p. 85 et seq. and § 22, p. 123; *Registration of Trade-Marks*, Act of July 5, 1946, Title I, § 10. Thus, plaintiff's assignment of its trademark necessarily transferred *all* of the good will of the business in which the trademark was used, *Eiseman v. Schiffer*, 157 Fed. 473, 476; *Macmahan Pharmacal Co. v. Denver Chemical Mfg. Co.*, 113 Fed. 468, 474 et seq., since, as it is sometimes expressed, "the shadow cannot be separated from the substance", *Ward-Chandler Bldg. Co. v. Caldwell*, 8 Cal. App. 2d 375, 378 (4), 47 P.2d 758. In other words, plaintiff should not be allowed to sell its cake and eat it too, *King Pharr Canning Operations v. Pharr Canning Co.*, 85 F. Supp. 150, 156 (14).

On September 20, 1950, plaintiff herein sold its

"entire right, title and interest in and to the trade-mark 'Sun-Kist' and registrations thereof, *together with that part of the good will of the business . . . connected with the use of and symbolized by the mark.*" (R. 173.)

If, then, plaintiff assigned the good will connected with the trademark, and if, as the District Court found, the contract and injunction are a part of that

good will (R. 96), how then can the court conclude that plaintiff has not terminated its rights under the contract of March 10, 1917, or under the injunctive decree of June 15, 1937? (R. 110, Finding 8.)

True, the plaintiff did not expressly assign the contract and injunction by specifically saying so (Finding of Fact No. 6, R. 110); but this circumstance is of absolutely no importance when the applicable law on the subject is considered. The following cases, among countless others, uniformly recite that when one assigns his trademark, he automatically divests himself of *all* of the good will connected with that mark. No express assignment is needed because good will is not susceptible of being disposed of *or retained* independently.

Browning King Co. of New York v. Browning King Co., 176 F.2d 105, 106;

Continental Corporation v. National Union Radio Corp., 67 F.2d 938, 942 (2);

E. F. Prichard Co. v. Consumers Brewing Co., 136 F.2d 512, 518 (8, 9);

Greyhound Corporation v. Rothman, 84 F. Supp. 233, 239 (8);

Macwilliam v. President Suspender Company, 46 D.C. 45, 48 et seq.;

Mayer Fertilizer & Junk Company v. Virginia-Carolina Chemical Company, 35 App. D.C. 425;

United States Ozone Co. v. United States Ozone Co., 58 F.2d 1051, 1055 (1, 2);

Ward-Chandler Building Company v. Caldwell, supra, 8 Cal. App. 2d 375, 378 (4).

See also:

Restatement of the Law of Torts, Vol. III,
 § 755, and § 756, comment c, page 680;
 California Civil Code, § 1084;
 5 Cal. Jur. 2d, Assignments, § 51, page 330;
 Restatement, Contracts, §151(a), illustration 4;
 Nims, Unfair Competition and Trade-Marks,
 § 17, p. 89, and § 234, p. 806.

Plaintiff's contention that it may assign its trade-mark and still retain something so primarily and essentially a part of it as the benefit under a contract entered into for the unique purpose of protecting it smacks of the same "hocus-pocus" condemned by Judge Minton of the Court of Appeals for the Third Circuit in *California Fruit Growers Exchange v. Sunkist Baking Co.*, 166 F.2d 971. In that case, the present plaintiff and its assignee sought to *divide* the good will of the "Sunkist" and "Sun-Kist" trademarks between themselves by contract. The court's impression of this chicanery was expressed as follows on page 975:

"We are supposed to believe that when a customer bought fruits or vegetables under the name 'Sunkist', he was not confused as to whether the fruit came from the California Fruit Growers Exchange or the vegetables from the California Packing Corporation; but if he bought a loaf of bread under the name 'Sunkist', he was likely to think he bought it from one or the other of the plaintiffs because they sold fruits and vegetables, but never bread. With the plaintiffs practicing such hocus-pocus with the trade-name 'Sunkist',

we shall ask to be excused when we are admonished by these dividers of confusion by contract to hear their vice-president and advertising manager shout confusion on behalf of the purchasing public.”

The “hocus-pocus” still continues, however, with the plaintiff now contending, despite its sale of the trademark “Sun-Kist” for more than a million dollars that it still retains that part of the associated good will represented by the contract and injunction!

Such a proposition just cannot be maintained, especially in the light of the rule that an attempted assignment of a trademark, unaccompanied by all of the good will with which it has been used, is ineffectual for any purpose except as evidence of an abandonment of the mark by the assignor, *Sauers Milling Co. v. Kehlor Flour Mills Co.*, 39 D.C. 535, 542; *Browning King Co. of New York v. Browning King Company*, supra, 176 F.2d 105, 106 [2, 3]; Restatement, Torts, § 752 and § 755 at page 676.

Therefore, since plaintiff has abandoned its trademark, it cannot successfully object to the use of even a *similar* mark by defendant merely because defendant’s predecessor signed an agreement 40 years ago, *Segal v. Storch*, 56 A.2d 134, 136 [6], 141 N.J.E. 78; Derenberg, Trade-Mark Protection and Unfair Trading, 1936, § 52, p. 66 II.

Findings of Fact Nos. 4, 5, 8, 9, 10, 11, and 13 are unquestionably erroneous.

III. THE VALIDITY OF THE CONTRACT OF MARCH 10, 1917 DEPENDS ENTIRELY UPON PLAINTIFF'S OWNERSHIP OF THE TRADEMARK "SUN-KIST".

That the previous ownership of the mark "Sun-Kist" by plaintiff has controlling significance upon this case can be plainly seen from a survey of the broader law of unfair competition of which the substantive law of trademarks is merely a branch, *United Drug Co. v. Rectanus Co.*, 248 U.S. 90, 97, 39 S.C. 48; *Standard Oil Company v. Standard Oil Company*, 252 F.2d 65, 71 [1-3]; *Triangle Publications v. Hanson*, 65 F. Supp. 952, 958 [8]; 24 Am. Jur. 812, Good Will §§ 12, 13, 16, 17; Nims, Unfair Competition and Trade-Marks, § 20a.

The facts of this case fit in perfectly with the classic situation wherein the vendor of a business agrees not to compete with the buyer within a certain area. For example, A owns a dairy business. A sells that business to B, agreeing at the same time that he (A) will not engage in the dairy business in the same area as B. B subsequently sells his dairy business together with the good will to C, making no specific mention of A's agreement not to compete. Thereafter, A re-enters the dairy business in the same area. Suppose, then, that B seeks to obtain an injunction against A upon the theory that he had a right to reserve A's covenant to himself even though he had disposed of the rest of the dairy business. In *Burchell v. Capital City Dairy, Inc.*, 163 S.E. 81, 158 Va. 6, it was held that an injunction enjoining the original vendor (A) from engaging in the dairy business should be dissolved be-

cause there was "no person before the court who was then entitled to have the covenant enforced." The court then recognized the rule that:

"Such a covenant is assignable by the purchaser of the business, even though it does not run to the purchaser and his assigns; and if the purchaser in turn sells the business, including his good will, the covenant passes as an appurtenance of, or an incident to, the business sold by the purchaser without a specific assignment thereof, or of the contract in which it was made." (163 S.E. at 82 [2].)

In other words, continued the court at page 82 [3], when B sold to C "he [B] lost all right to enforce by injunction the restrictive covenant of A."

In the present case, defendant's agreement to restrict the use of its trademark "Sun-Maid" is indistinguishable from A's promise not to engage in the dairy business. Like A's covenant not to compete, defendant's agreement was incidental to the good will attached to the property (trademark "Sun-Kist") for whose protection it was made. It is enforceable, if at all, only by the assignee of the trademark. Plaintiff's right to enforce it ended with its transfer of the mark to Sunkist Growers, Inc. Nims, Unfair Competition and Trade-Marks, § 20a, at page 115 et seq.

The following cases, selected from literally hundreds to the same effect, fully support defendant's position that the restrictive agreement contained in the March 11, 1917 contract cannot be retained by plaintiff, no matter what contrary intention it may now have, since

such an agreement can have no vitality apart from the trademark which it was intended to protect:

- Francisco v. Smith*, 38 N.E. 980, 981, 143 N.Y. 488;
George M. Danke Co. v. Marten, 241 N.W. 359, 361 [1, 2];
Goldman v. Bootman, 167 N.Y.S. 196, 197, 179 App. Div. 767;
Graca v. Rodrigues, 33 Cal. App. 296, 298, 165 P. 1012;
Haugen v. Sundseth, 118 N.W. 666, 667, 106 Minn. 129;
Irving Investment Corporation v. Gordon, 66 A.2d 54, 58 et seq., 3 N.J.S. 385;
J. L. Davis, Inc. v. Christopher, 122 So. 406, 407 [6] et seq. (Ala. 1929);
Mahlstedt v. Fugit, 79 Cal. App. 2d 562, 566 [2], 180 P.2d 771;
Peterson v. Johnson Nut Co., 283 N.W. 561, 569 [15], 204 Minn. 300;
Nye Odorless Incinerator Corp. v. Felton, 162 A. 504, 511 [17-19], 35 Del. 236;
Russell v. Russell, 39 Cal. App. 174, 176 et seq., 178 P. 307;
Shafer v. Sloan, 3 Cal. App. 335, 337, 85 P. 335;
Wright v. Scotten, 121 A. 69, 71 [1], 13 D. Ch. 402.
 Cf. *Los Angeles University v. Swarth*, 107 Fed. 798, 804, 806.

See also:

Corbin, Contracts, Vol. IV, § 885, page 555.

For this further reason, Findings of Fact Nos. 4, 5, 8, 9, 10, 11 and 13, and Conclusion of Law No. 2 are completely erroneous.

IV. THE CONTRACT OF MARCH 10, 1917 AND THE INJUNCTION HAVE BECOME AN ILLEGAL RESTRAINT ON TRADE BECAUSE OF CHANGED CONDITIONS.

The District Court bases its conclusion that the contract is not an illegal restraint on trade upon a discussion of the Sherman Anti-Trust Act (15 U.S.C.A. § 1 et seq.). Application of this Act to the facts of this case does not seem appropriate inasmuch as defendant does not contend that plaintiff is attempting to create a monopoly which would exclude the public from access to competitive commodities. (See discussion in 45 A.L.R. 2d, § 146 (a), page 192.) The contract of 1917 was a simple restrictive covenant which, when tested in the light of circumstances *existing at the present time*, has become an illegal restraint on trade, *Illinois Central R. Co. v. Illinois*, supra, 56 N.E. 2d 432, 440 [5], 387 Ill. 256.

The District Court mistakenly quotes a statement from 17 C.J.S., Contracts § 22 and cites several cases to the effect that if a contract is valid when made it cannot be invalidated by conditions developing at a later date. (R. 93 [99].) This rule applies only to the constitutional guarantee that “No *state* shall . . . pass any . . . law impairing the obligation of contract . . .” (Art. I, § 10, Cl. 1, United States Constitution.) The court failed to take into consideration § 24, Contracts, of the same volume of C.J.S. which points out

that this rule is subject to many limitations; and §§ 464 and 467 which make it clear that cessation of the existence of facts existing at the time of entering into the contract will excuse performance, and that a contract is discharged where, after it has been entered into, the performance is made unlawful.

The contract of 1917 has unquestionably become an illegal restraint on trade (not a monopoly) because it now contravenes the rule that a restrictive covenant of this type must be ancillary to the *main purpose* of a lawful contract, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282, Nims, Unfair Competition, § 20a, p. 141. It further violates the rule that the covenant must be necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, *Irving Investment Corporation v. Gordon*, *supra*, 66 A.2d 54, 58 [2], 3 N.J.S. 385.

In 1917, when defendant's predecessor entered into the agreement not to use its mark on certain products, it was probably unobjectionable since the promise was ancillary to the main purpose of the contract, that is, to protect plaintiff's predecessor in its use of its trademark "Sun-Kist," *California Packing Corporation v. Sun-Maid Raisin Growers of California*, 81 F.2d 674, 676 [statement of facts], and page 677 [3] et seq.

However, as pointed out by Professor Corbin (Contracts, § 1387, page 492), the restraint became illegal when plaintiff completely disposed of the subject matter of the main contract. The restraint on defendant has now become the main purpose and as such is unenforceable. A restraint in gross, like an injunction

in gross, is invalid after its justifying reasons have ceased to exist, *Glantz v. Willow Supply*, 53 A.2d 346, 349 [7-9] and [12-15], 139 N.J.E. 523; *M. M. Ullman & Co. v. Levy*, 133 So. 369, 370 [2, 3], 172 La. 79; *American Weekly, Inc. v. Patterson*, 16 A.2d 912, 915, 179 Md. 109.

Furthermore, going back again to the narrower specific field of trademarks as such, it has been the long established rule that the proprietor of a trademark, unlike the owner of a patented invention, may not make a negative and merely prohibitive use of it, *United Drug Co. v. Rectanus Co.*, supra, 248 U.S. 90, 97, 39 S.C. 48; *Segal v. Storch*, supra, 56 A.2d 134, 136 [2-5]; *American Photographic Pub. Co. v. Ziff-Davis Pub. Co.*, 135 F.2d 569, 573. Conversely, it is absurd to say, as does the District Court in this case, that the owner of a trademark can assign the trademark to another with *almost all* of the good will, and still make a negative use of a segment of that good will represented by the contract and injunction. The fact that plaintiff continues to derive a substantial advantage from the injunction is certainly no justification for its continuance, and it has been emphatically so held, *Segal v. Storch*, supra, at page 136.

The case of *Desny v. Wilder*, 46 Cal.2d 715, 730, 299 P.2d 257, cited by the District Court (R. 103), cannot conceivably be said to be "akin" to that of the case now before this court. In the *Desny* case the court held that a person agreeing to pay for an idea which is not protected, will be held to his bargain notwithstanding the fact that, before disclosure, he could have

used the idea without paying for it. The case is not germane to the issues here because an *agreement to pay for something* is entirely different from an *agreement not to do something* as an essential part of a main contract. The agreement to pay for the idea is the main purpose of the contract. Here, the agreement not to use "Sun-Maid" on certain products is necessarily ancillary to the main purpose of the contract. Surely, the main purpose of the 1917 contract was not to arbitrarily keep defendant from using its mark on all grocery products.

Conclusions of Law Nos. 1 and 2 are, therefore, incorrect.

V. BASIS FOR DISSOLUTION OF THE INJUNCTION.

Defendant has made a showing of one important fact—that plaintiff no longer owns the trademark "Sun-Kist". This one fact amounts to an overwhelming basis for dissolution of the injunction in the light of the above discussion.

As pointed out before, there can be no vested right in a permanent injunction even if it is enforcing a contract. As stated in *United States v. Swift*, 286 U.S. 106, 52 S.Ct. 460, the inquiry for us is whether there are changes so important that dangers once substantial, have become "attenuated to a shadow". When plaintiff here divested itself of its trademark there was no longer a substantial danger that its interests were in danger. The danger had not only "attenuated

to a shadow"—it had completely vanished! See *Tobin v. Alama Mills*, 192 F.2d 133, 136 [3]; and *Douds v. Wine, Liquor and Distillery Workers Union*, 75 F. Supp. 184, 188 [12].

Thus, looking back to 1936, when the injunction was granted, we see that had the present state of affairs existed then, no court could have reasonably listened to plaintiff's contention that the contract should be enforced in gross, *Burbridge v. Hicks*, 286 S.W.2d 678, 679 [2], (Texas).

In *Coca-Cola Co. v. Standard Bottling Co.*, 138 F. 2d 788, an injunction had been issued, by consent, against defendant prohibiting use of the word "cola". A reading of the case makes it clear that the only reason for the injunction was to protect the then distinctive trademark "Coca-Cola". However, sixteen years after the injunction was issued defendant successfully sought modification of the injunction in the District Court on the ground that the word "cola" was no longer distinctive. On appeal, the Court of Appeals for the Tenth Circuit affirmed the lower court quoting the *Swift* case as follows:

" 'We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions, though it was entered by consent. . . . A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.' "

Obviously, the sale by plaintiff of its mark is an entirely sufficient basis for dissolution of the injunction for this is exactly the type of "changed condi-

tion'' which the cases repeatedly refer to when dissolving injunctions.

In re Jackson, 9 Fed. 493 (1881);

Ross v. Veltmann, 161 S.W. 1073, 1074 [2], (Texas);

Burbridge v. Hicks, *supra*, at p. 679 et seq.;

City Central Bank & Trust Co. v. Jackson et al., 45 S.W.2d 433, 435 [3], (Texas);

Whitson v. City of Kingfisher, 54 P.2d 616, 622 [10] 176 Okla. 145;

Atchison, T. & S.F. Ry Co. v. Shriver, 166 Pac. 519, 520, 101 Kan. 257;

High, *A Treatise on the Law of Injunctions*, 4th ed., 1905, Vol. II, pages 1492-1493, § 1495;

43 C.J.S., *Injunctions*, § 84, page 567, § 242, p. 982.

Conclusion of Law No. 3 is plainly wrong.

VI. PLAINTIFF HAS NO RIGHT TO ENFORCE THE INJUNCTION SINCE IT IS NEITHER A PROPER NOR NECESSARY PARTY.

The District Court's refusal to join Sunkist Growers, Inc., the assignee of the trademark "Sun-Kist" is contrary to the established rule that in order to be entitled to maintain an injunction, the complainant must be the owner of the thing sought to be protected, *George M. Danke Co. v. Marten*, *supra*, 241 N.W. 359, 361 [1, 2], 207 Wis. 290; Hopkins, *The Law of Trademarks, Tradenames and Unfair Competition*, § 175, page 399; 43 C.J.S., *Injunctions*, § 35; 28 Am. Jur., *Injunctions*, §§ 273, 316.

The cases uniformly hold that the real party in interest is *the assignee of the business or trademark to which the restrictive covenant is necessarily and irrevocably attached* (*Knowles v. Jones*, 62 So. 514, 515 [4], 182 Ala. 187; *Anderson v. Truitt*, 148 A. 223, 225 [5], 158 Md. 193; *Weber v. City of Cheyenne*, 97 P.2d 667, 669, 55 Wyo. 202; *Noble v. One Sixty Commonwealth Avenue, Inc.*, 19 F. Supp. 671, 672); and the only party who may oppose a motion to dissolve an injunction is one who can show he would be entitled to the issuance of an injunction, 43 C.J.S., Injunctions, § 225, page 964.

The District Court's only statement in support of its position that plaintiff is the proper party in this case is: "An assignor at common law had the sole right to protect the assignee, by legal means, in the thing he assigned or in the rights ancillary to it." (R. 97.) With this general principle defendant agrees, and indeed, such was the law of this country—in 1805, *Winchester v. Hackley*, 6 U.S. 342, 2 L. Ed. 299. However, the law has matured and changes have appeared, specifically Rule 17(a), Rules of Civil Procedure (28 U.S.C.A., Rules for Ninth Circuit) which directs that "Every action *shall be* prosecuted in the name of the real party in interest." To the same effect is § 367, Code of Civil Procedure of California, except that it is even more emphatic. It demands that "Every action *must be* prosecuted in the name of the real party in interest."

In the face of this definite reversal of the common law authority relied on by the District Court, it is difficult to understand how it could have reasonably

denied defendant's motion to join Sunkist Growers, Inc. It is, after all, an elementary principle that in order to justify the continuation of an injunction, the plaintiff must clearly show *its* need of it. A plaintiff cannot succeed because *someone else* may be hurt, *Darby v. Daniel*, 168 F. Supp. 170, 188 [8].

In this connection, it is necessary to consider the status of Sunkist Growers, the assignee.

At the outset, it is important to note that the assignee, Sunkist Growers, Inc., does not and never has used the trademark "Sun-Kist" (hyphenated). Its trademark is "Sunkist" (unhyphenated) which it has employed since 1907. (See *California Fruit Growers Exch. v. Sunkist Baking Co.*, 166 F.2d 971, 972.)

Some years prior to the 1950 assignment of the trademark "Sun-Kist" by plaintiff to Sunkist Growers, Inc., these two parties entered into a contract (R. 179-181) whereby each granted the other the right to employ their marks "Sun-Kist" and "Sunkist" on certain goods. (*California Fruit Growers Exchange v. Sunkist Baking Co.*, supra.) In other words, Sunkist Growers has nothing more now than it had before the assignment except that it obtained freedom from suit by plaintiff under that contract. For the \$1,250,000 paid to plaintiff, Sunkist Growers merely received what amounts to a covenant not to sue from plaintiff, and thereby became entitled to the use of its "Sunkist" trademark on canned goods as well as on fresh fruit.

Sunkist Growers was not a party to the contract of March 10, 1917, or to the litigation that resulted in

the issuance of the injunction. (R. 111, Finding No. 14.) However, it did have notice of the proceedings in this case and informed defendant that the dissolution of this injunction was a matter "to be resolved between defendant and plaintiff, and that it desired neither to consent *or object* thereto." (R. 82.)

Thus, defendant, by a continued enforcement of the injunction, must restrict its trademark, yet no one derives any *legitimate* benefit from such restriction—plaintiff no longer has anything to protect, while the assignee of the mark is totally indifferent. Surely, on equitable principles, as well as the clear statutory requirements as to parties, defendant is entitled to have Sunkist Growers, Inc. joined as a party so that *if any controversy still exists*, it may be settled between the proper parties.

CONCLUSION.

In view of the controlling law on the facts of this case, it is requested that the order of the District Court be reversed and that the injunction be dissolved.

Dated, San Francisco, California,
March 27, 1959.

Respectfully submitted,

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*Attorneys for Appellant-defendant
Sun-Maid Raisin Growers of California.*





No. 16,224 ✓

In the
United States Court of Appeals
For the Ninth Circuit

JAMES FLOOD and MARY EMMA STEBBINS,
as Trustees of the Trust created by
Paragraph III of the Last Will of
James L. Flood, Deceased,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the Northern District of California.

Brief for Appellants

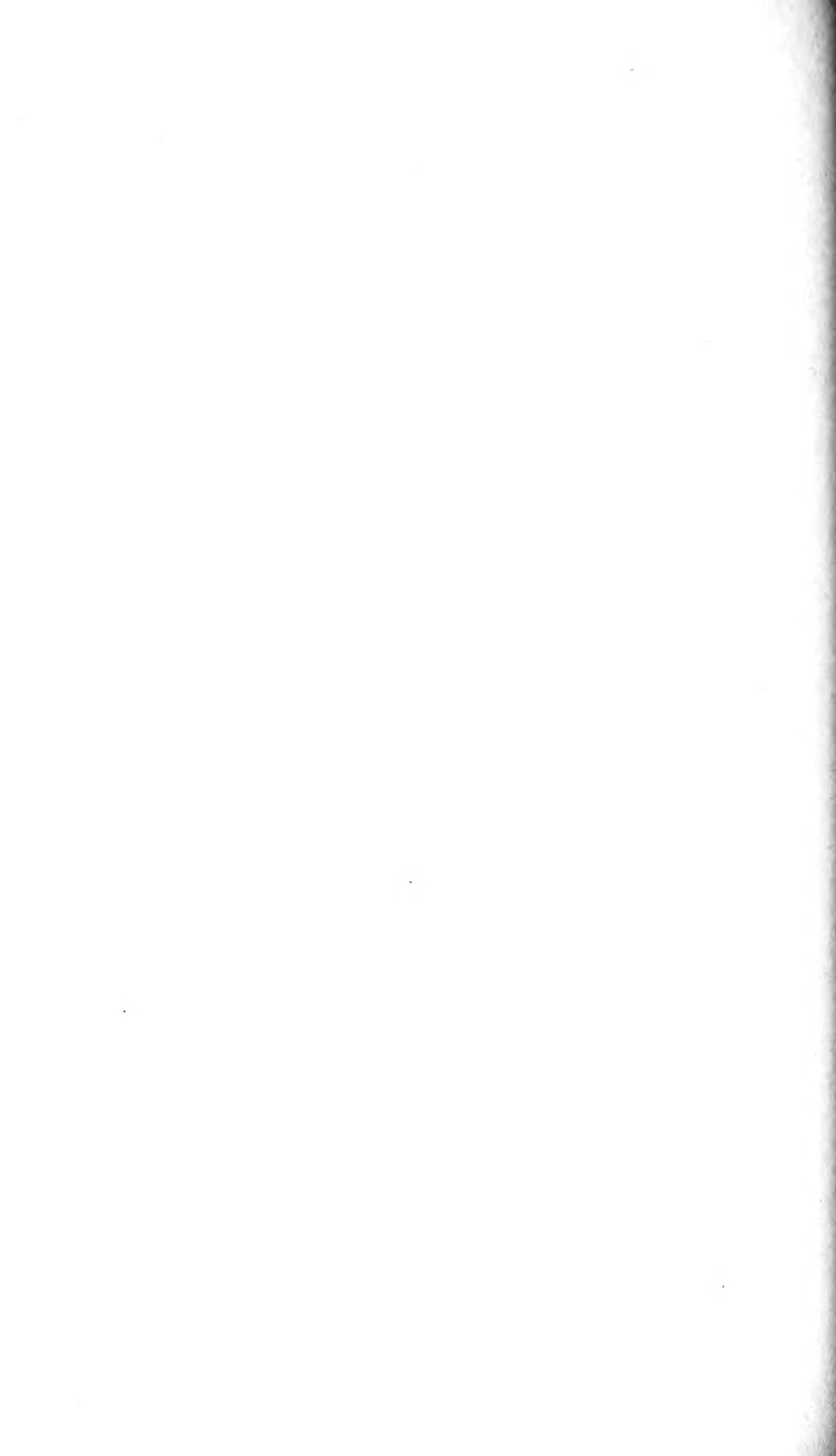
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No. 16,224

In the
United States Court of Appeals
For the Ninth Circuit

JAMES FLOOD and MARY EMMA STEBBINS,
as Trustees of the Trust created by
Paragraph III of the Last Will of
James L. Flood, Deceased,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the Northern District of California.

Brief for Appellants

OPINION BELOW

The memorandum opinion rendered below by the District Court (R. 62-77) is reported in 157 F. Supp. 438 (N.D. Cal. 1957).

JURISDICTION

This appeal is taken from the judgment of the District Court rendered in two eminent domain proceedings brought by the United States of America through its

Administrator of General Services and under which the United States took use and occupancy of the Flood Building, 870 Market Street, San Francisco, from February 1, 1951 to June 30, 1954. These actions were brought pursuant to the authority vested in the Administrator under sections 257 and 304c of title 40, U.S.C. (R. 3-4, 33-34), jurisdiction thereof being conferred upon the District Court by 28 U.S.C., sec. 1358. *See also*: 28 U.S.C., secs. 1331, 1345. Final judgment was entered in the consolidated cases on June 10, 1958 (R. 86-88). Thereafter on August 7, 1958, and within sixty days of the entry of judgment a notice of appeal was filed by appellants (R. 88). Jurisdiction of this appeal is conferred upon this Court by 28 U.S.C., sec. 1291.

QUESTION PRESENTED

The United States of America, taking the use and occupancy of a building under its power of eminent domain, has an unquestioned duty at the conclusion of the term of its taking to surrender the premises in the condition in which they were received, reasonable wear and tear excepted. Simply stated, the instant case raises the question of the measure of the just compensation payable under the Fifth Amendment to the United States Constitution when the Government, having altered the premises taken to suit its taste and convenience, elects to breach its duty and return the premises to their owner as so altered.

STATEMENT OF THE CASE

I. Case 30319—and the Government's Alteration of the Flood Building.

The first of the two actions before the Court was filed by the United States on January 29, 1951. By its Complaint

in Condemnation filed that day, the Government sought to take the right to use and occupy the entire Flood Building, 870 Market Street, San Francisco, for the housing of Federal agencies in the City and County of San Francisco (R. 3-7). This right was sought "for a term for years commencing February 1, 1951 and ending June 30, 1951, extendible for yearly periods thereafter at the election of the United States * * * no extension of said term to be made after June 30, 1955." (R. 4) Concurrently with the filing of its action, the United States secured an *ex parte* Order for Immediate Possession directing that possession of the building be delivered to the Government three days hence on February 1, 1951 (R. 8-9).

When the Government entered the Flood Building on February 1, 1951, it took a building in no way designed for the housing of Federal agencies. The Flood Building is a familiar San Francisco landmark fronting on Market, Eddy, Powell and Ellis Streets in downtown San Francisco (R. 28-29, 56-57). It is a steel frame, twelve-story, concrete, Class A Building with a sandstone and brick facing, covering an area of 30,000 square feet. *See: Defs.' Exhibits A, N, O, P, Q.* On February 1, 1951, the building's ground floor, with the exception of its lobby, was devoted to a number of stores fronting on Market, Powell, and Eddy Streets, being in the words of an expert witness of the government "one of the finest retail locations in the city" (R. 268). The second through twelfth floors of the building were devoted to office space. On the sixth through twelfth floors 117,257 square feet of rentable space was laid out for medical-dental occupancy, the building having accommodated 300 doctors and dentists (R. 119, 187, 392). The remaining four floors, which contained 50,923 square feet of rentable space, were designed for commercial tenancies, including commercial tenancies of the type characteristically found in

medical centers, that is, pharmacies, laboratories and similar allied enterprises (R. 119, 187).

The Flood Building is owned by appellants as trustees of the trust created by the will of their late father, James L. Flood, who constructed the building (R. 79). Although the medical-dental character of the Flood Building dates back many years, commencing in 1934 and continuing to 1945, the building owners pursued a course of modernizing its medical-dental suites (R. 120-121, 380-382). Following the lead of the newest medical-dental buildings in San Francisco, medical-dental offices were characteristically divided by partitioning walls into suites consisting of a number of rooms, reflecting the needs of the medical or dental practitioner. Although the Government on entry prepared plans showing the exact layout and condition of each floor of the building, which are before the Court as *Defendants' Exhibits F.1 to F.22*, inclusive, generally medical-dental suites were laid out with reception rooms, operating rooms, consultation rooms, business offices, laboratories, dressing rooms, X-ray developing rooms, and other space required for medical or dental practice. Serving these offices were medical and dental basins, sinks, lavatories, shelving, cabinets, recessed file drawers, casement windows, X-ray viewboxes, gas, compressed air and the electrical outlets required for medical and dental equipment. As a result of the program of modernization pursued, the medical-dental suites "were regarded as the equal to any medical-dental suites that were in any of the buildings in San Francisco" (R. 456). Although one government expert witness termed the suites "gold plated," it was obvious that even a gold-plated medical-dental suite is wholly unsuited for the housing of Federal agencies.

As a result, almost immediately after the Government entered the Flood Building, the General Services Adminis-

tration commenced preparing plans for the alteration of the premises, particularly plans for the demolition of the medical-dental and related suites. Without consulting the building owners, by April, 1951, the United States had embarked on the conversion of the Flood Building from a medical-dental building to a general Government office building. The great majority of the alterations made in the premises were made pursuant to written contracts, which were stipulated to have been fully performed and are in evidence. *See: Defs.' Exhibits E, G, G-1 to 7, inclusive, H-1 to 13, inclusive, I, J, K, L and M.* Graphically, the extent of the Government's demolition is shown on *Defs.' Exhibits G-1 to 6, inclusive, and H-1 to 12, inclusive*, which are alteration drawings showing the alterations made under the two largest alterations contracts. While reference to the foregoing contracts shows the alterations made by the United States suite by suite in the subject premises, it was stipulated by the parties at the commencement of trial (*Defs.' Exhibit E*):

"That the plaintiff United States of America, after taking the use and occupancy of the Flood Building on February 1, 1951, and prior to the return of the subject premises made alterations upon the third to twelfth floors, inclusive, on said building, which said alterations included the demolition of partitions, the removal of electrical wiring and conduit, the removal of lavatories, sinks, workbenches, cabinets, shelving, view-boxes, closets, the removal of gas piping, air piping, electrical outlets and switches, the removal and relocation of radiators, the removal of plumbing fixtures, the cutting of doors through walls, and the painting of stained and bleached oak room trim."

When this program was completed not a single medical-dental suite remained in the Flood Building. In the transformation of a medical-dental office building to a Govern-

ment office building 1,474 electrical outlets were removed (*Defs.' Exhibit V*). 190 gas connections and 188 air connections were ripped out (*Defs.' Exhibit W*). 37 X-ray view-boxes were removed (*Defs.' Exhibit S*). 52 casement windows were destroyed (*Defs.' Exhibit T*). 13 recessed file cabinets were demolished (*Defs.' Exhibit AD*). 113 so-called 450 Sutter type sink cabinets were removed (*Defs.' Exhibit Z*). 266 twelve inch by twelve inch sinks were carried away (*Defs.' Exhibit Y*). 158 vitreous china basins were appropriated and removed from the building (*Defs.' Exhibit X*). And 107 450 Sutter type lavatories were removed from the building. At the same time 10,355.5 lineal feet of sheetrock partitions on wood studding were demolished, together with 2,401.5 lineal feet of gypsum block and plaster partitions (*Defs.' Exhibits A-I, AH*). 987 doors of eight different types were carried off by the Government for use at other places (*Defs.' Exhibit AB*). 2,088 lineal feet of laboratory workbenches were destroyed (*Defs.' Exhibit X*). What this meant to the Flood Building can be seen in microcosm by examining *Defendants' Exhibits B and C*.

Defendants' Exhibit B shows the floor plan of a combined medical-dental suite on the eleventh floor of the Flood Building, which was divided into twelve rooms, including a doctor's operating room, a treatment room, a consultation room, laboratory, a business office, a reception room, a dentist's business office, operating room and laboratory (R. 121-122). This suite the Government converted into three large rooms, tearing out all of the medical-dental fixtures. See: *Defs.' Exhibit G-2*. *Defendants' Exhibit C* shows a typical dental suite on the eleventh floor of the Flood Building in which offices numbered 1163 and 1165 were divided into a reception room, operating room, laboratory and business office. This suite was destroyed by the Gov-

ernment and converted into two large rooms, all of the special dental fixtures being removed. *See: Defs.' Exhibit G-2.*

While the United States was assiduously engaged in converting some 117,257 square feet of medical-dental space to general Governmental office space, it found itself wholly unable to utilize the Flood Building basement and the extremely valuable ground floor shops. Thus, with the exception of areas thereof required in connection with its occupancy of the second through twelfth floors, the United States on May 15, 1951, abandoned the basement and ground floor, filing a Notice of Dismissal and Abandonment (R. 9-11). Its right to so abandon a part of the building being opposed by defendants, who were thereby placed in an extremely difficult position, the United States elected not to extend the term of its occupancy under its Complaint, which expired on June 30, 1951.

II. Case No. 30675—and the Return of the Premises as Altered to Appellants.

Having elected not to continue possession of the Flood Building under the action filed on January 29, 1951, but desiring the continued use of the premises less those portions abandoned on May 15, 1951, the United States on June 29, 1951, filed a second action. By its Complaint in Condemnation, the United States sought the right to the use and occupancy of the second through twelfth floors of the Flood Building, plus portions of the ground floor and basement, for the housing of Federal agencies in the City and County of San Francisco (R. 33-38). Use was sought for "a term for years commencing July 1, 1951, and ending June 30, 1952, extendible for yearly periods thereafter until June 30, 1956, at the election of the United States" (R. 34). Electing to extend the term on two occasions, the Govern-

ment effected a continuous occupancy of the premises from February 1, 1951 until June 30, 1954, when the premises were surrendered to appellant owners. As a result the conversion of the Flood Building from a medical-dental building to a Government office building, which had started during occupancy under the first case, continued without interruption under the second case.

The exclusion of the ground floor and basement from the Government's taking presented a serious problem to the appellant trustees. In 1944 during World War II, the building owners, in the belief that post-war rentals would fall substantially below those then being realized, entered into a fifty-year lease of the premises with the F. W. Woolworth Co. (*Pl.'s Exhibit 33*). Under this lease the building was to be delivered to the Woolworth Company on February 1, 1951, which was to forthwith replace the building with a new structure (*Pl.'s Exhibit 30*). The lease expressly provided that "Landlord agrees to make diligent effort to deliver to Tenant physical possession of the demised premises on the first day of February, 1951. * * * If Landlord is unable to deliver possession of said premises on the date hereinabove set forth because of failure or refusal of Tenants to vacate, then the date of delivery shall be postponed until such time as such persons shall be removed and Landlord shall proceed with due diligence to cause the removal of all such persons * * *. The term of this lease, anything to the contrary notwithstanding shall not commence for any purpose until possession of said demised premises has been delivered by Landlord, free and clear as above provided * * *."

Thus, not only did the Government's taking preclude performance of the subject lease, but the obligations imposed upon the building owners by that lease precluded them from renting the ground floor shops and basement

abandoned by the Government. Having no way of knowing when the Government would surrender the space occupied by it, the owners had no means of knowing when they would be obligated to deliver the building to Woolworth. Faced with the cost of taxes and insurance on the ground floor shops while unable to rent them, the building owners entered into negotiations with the United States and with the Woolworth Company. The latter agreeing to take the ground floor and basement of the building if it could at the same time secure the second floor, the owners secured the release of the second floor from the United States on September 29, 1951, pursuant to Stipulation for Partial Dismissal (R. 39-41) and Order entered thereon (R. 41-42). Accordingly, a new lease was made by the Flood trustees with Woolworth, by the terms of which Woolworth constructed its long-planned downtown store in the basement, ground floor and second floor of the building, while the Government continued to occupy the third through twelfth floors of the building (*Pl.'s Exhibit 31*).

Confronted then with the necessity of resuming the management of the third through twelfth floors of the building at such time as the Government surrendered them, after consultation with their real estate advisers the trustees caused the following letter to be forwarded to the United States on December 30, 1953 (*Defs.' Exhibit AR*):

“United States of America
c/o M. Mitchell Bourquin
Special Assistant to United States Attorney
718 Crocker Building
620 Market Street
San Francisco 4, California

Re: U. S. v. Building known as Flood Building, 870
Market Street, San Francisco, Flood Estate, et

al., Nos. 30319 and 30675, U.S. Dist. Ct. for Northern Dist. of Calif., Southern Div.

Dear Sirs:

Under date of February 1, 1951, pursuant to the first action above mentioned, you took and entered the building known as the Flood Building located at 870 Market Street, San Francisco, California, and occupied same until June 30, 1951 (portions of the ground floor and basement of said building were allegedly abandoned by you on May 15, 1951). Under the second suit above mentioned you took and entered the second to the twelfth floors, inclusive, and a portion of the basement of said building, and are presently occupying said space under the taking in said second suit with the exception of the second floor which was voluntarily released under date of September 28, 1951.

Approximately 125,000 square feet of office space of said floors, now occupied by you, at the time of entry on February 1, 1951, were arranged with partitions, plumbing, lighting, heating, gas, floor coverings, etc., for occupancy as medico-dental space. We are informed, and believe, that after entry you demolished the special arrangements installed for adapting said space to medico-dental occupancy, presumably for the purpose of arranging said building for the convenience of the various agencies of the Government who were to occupy said space. A portion of said demolition took place during the occupancy by you under the first suit above mentioned and a portion during the occupancy by you during the second suit above mentioned. The exact portions of such demolition as may have taken place under said respective suits is unknown to us.

In The San Francisco News, under date of Friday, December 18, 1953, there appeared a news release which we have been informed emanated from the Department of General Services located in San Francisco. It was there stated that 'the Federal Government will move out of the Flood Building on June 30 and adver-

tise within a few weeks for bids for other quarters.' In other words, that the ten floors of office space now occupied by you under the second above mentioned condemnation suit will be turned back to the owners at the close of Wednesday, June 30, 1954.

Upon inquiry by us as to the truth of the matters set forth in said news release, we have received no denial, and we are informed by the local Department of General Services that it is the Government's intention to act as above indicated.

In view of the fact that some 168,000 square feet of office space will be returned to the owners as of July 1, 1954, we hereby demand on behalf of said owners that you restore, prior to July 1, 1954, the entire premises now occupied by you *to the condition that they were in at the time of entry by you on February 1, 1951*, ordinary wear and tear excepted.

We point out to you at this time that such restoration is of great importance to us, and to you, as it will mitigate the damage incurred by reason of your taking, occupancy, demolition, and alterations of said premises. Demand is made at this time in order that you may promptly commence the restoration and complete same by July 1, 1954. We make this demand because it is our intention to again develop this building as a medico-dental center.

In like manner, this demand should not in any way inconvenience you as we understand that in excess of one-half of the space now held by you in the Flood Building is not in fact being used.

Yours very truly,

JAMES L. FLOOD and MARY EMMA STEBBINS
as Trustees under Paragraph III of the
Last Will and Testament of JAMES L.
FLOOD, Deceased

By WALTER C. FOX, JR.
FREDERICK M. FISK
Their Attorneys"

This letter was never acknowledged by the United States, which on June 30, 1954, returned the premises to the building owners exactly as they had been altered to suit the taste and convenience of the Government in housing its agencies.

III. The Trial of the Consolidated Cases.

Since the two actions brought by the Government resulted in a continuous occupancy of the Flood Building commencing on February 1, 1951 and ending on June 30, 1954, on December 13, 1953 the two actions were consolidated for trial (R. 17, 44). Thereafter, following the Government's return of the premises, on October 1, 1954, the parties entered into written Stipulations fixing the compensation payable to appellant trustees under the respective actions for the use of the premises, except only the compensation payable by reason of the failure of the United States to restore the premises to the condition in which they were at the time of taking, ordinary wear and tear excepted (R. 18-22, 45-50). On each Stipulation a Final Judgment was entered on October 21, 1954, which expressly provided:

"It Is Further Ordered, Adjudged and Decreed that jurisdiction of the Court is herewith retained to determine the amount of compensation, if any, which the aforesaid defendants shall be allowed by reason of the failure of the United States to restore the premises hereinabove described to the condition in which they were at the time of the taking, ordinary wear and tear excepted." (R. 32, 61.)

Thereafter, on January 25, 1956, pursuant to the foregoing reservation of jurisdiction, the consolidated actions came on for trial before the Honorable Oliver J. Carter, sitting without a jury. At the commencement of trial the parties entered into a written Stipulation, which was received in evidence as *Defendants' Exhibit E* (R. 94-95). By

this Stipulation the parties agreed (1) that the appellant trustees were the owners of the subject property and the persons entitled to receive all of the compensation determined to be payable; (2) that the United States had made certain described alterations in the premises; (3) that the alterations specified to be made in the Flood Building under specified contracts had been made; and (4)

“11. That in addition to the alterations made in accordance with the contracts referred to in the preceding paragraphs 2 to 10, inclusive, of this Stipulation, certain other alterations were made in the subject premises by the United States, and the Flood Building was returned by plaintiff to defendants on June 30, 1954 without any restoration of the premises to their condition prior to alteration as aforesaid being made by plaintiff.

“12. That the obligation, if any, of the United States to restore the 3rd to 12th floors, inclusive, of the Flood Building to the condition in which they were received, reasonable wear and tear excepted, accrued on June 30, 1954.”

The defendant trustees in their case in chief adduced evidence that the reasonable cost as of June 30, 1954, of restoring the premises to the condition in which they were on February 1, 1951 when taken by the Government, was \$600,652.29, that the time reasonably required to effect restoration was not less than six months and that the reasonable value of use of the premises for that period was \$177,976.02. The Government in its case offered evidence that the reasonable cost of restoration as of June 30, 1954 was \$401,000.00, that restoration could be effected in four months, and that the reasonable rental value of the premises for that period was \$40,000. In addition, the Government was permitted to call two witnesses who, testifying as experts, over appellants' objections expressed the opin-

ion that the market value of the Flood Building as of July 1, 1951, was greater than it would have been had it been in the condition received from defendants on February 1, 1951. One of these witnesses testified that the property's market value was so enhanced by \$225,000 (R. 269-270), while the other testified that the market value was increased on July 1, 1954 by \$225,400 (R. 330)—exactly the amount which the Government spent three years earlier in altering the premises to suit its taste and convenience (R. 354)!* Having received the Government's evidence as to market value, the appellant trustees called on rebuttal their real estate adviser, Mr. Colbert Coldwell of Coldwell Banker Company, who had advised the trustees to make demand upon the Government for restoration of the premises (R. 405-408). Mr. Coldwell detailed the reasons why in his opinion it was desirable to have medical-dental space in the Flood Building (R. 403-405). In his opinion the market value of the building on June 30, 1954, would have been \$400,000 greater had the Government restored the premises to the condition in which they were received (R. 431-435). At the same time, Mr. Coldwell testified that the market value of a building such as the Flood Building on a given date is of relative

*The testimony that the market value of the premises as of July 1, 1954, was increased by exactly the sum of the Government's alterations rested on a series of paradoxes and the assumption that the building could not secure medical-dental tenants. The Government witnesses, however, conceded that the Flood Building "is one of the finest retail locations in the city" (R. 268), that it is a "beautiful building" which will produce many years of income (R. 293) and that "there is an absolute need for medical buildings in the downtown section of any city" (R. 313). They did not question the fact that doctors are presently housed in downtown San Francisco in poorer quarters than those which the Government destroyed (R. 417-418, 452) or that had the Government discharged its obligation to restore, the Flood Building could profitably have offered its medical-dental space at rentals substantially below that being charged for comparable facilities (R. 452, 456-459). Suffice it to say, the Court rejected the suggestion of such claimed enhancement of value (R. 83).

unimportance to an owner who has no desire to sell the property, the significant consideration to such an owner being the integrity of his property and the continuity of income (R. 425-426).

The cause being submitted for decision on May 11, 1956, the District Court on December 19, 1957, rendered its Memorandum Decision (R. 77), after which Findings of Fact and Conclusions of Law were filed on June 10, 1958 (R. 77-85) and Judgment entered the same day (R. 86-88) holding the appellants entitled to take nothing.

IV. The Decision of the District Court.

In holding that the appellant trustees were entitled to take nothing, the District Court did not question that the Government had had an obligation to restore the premises to the condition in which they had been taken or that that duty had been breached. To the contrary, by its Conclusions of Law, the District Court expressly stated (R. 84):

“II.

On June 30, 1954, the United States of America, having altered the third through the twelfth floors of the Flood Building to suit its taste and convenience, was under an obligation to return those premises to the defendant trustees in the condition in which they had been received by it on February 1, 1951, reasonable wear and tear excepted.

“III.

The United States of America in returning the third through twelfth floors of the Flood Building to the defendant trustees on June 30, 1954, in the condition to which they had been altered to suit its taste and convenience and without restoring the same to the condition in which they were received by it on February 1, 1951, reasonable wear and tear excepted, breached its said obligation to the defendant trustees.”

Despite the fact that the Government had so breached its stated obligation, the Court held that the appellant trustees were powerless to secure any redress for the deprivation of their rights; that the Government was free to not only appropriate their property from the building but to studiously ignore its duty. This startling result the District Court explained as follows despite the absence of any judicial authority therefor (R. 85):

“Since the market value of the Flood Building when returned to defendants on June 30, 1954, was as great as it would have been had it been returned on that date in the condition in which it was taken on February 1, 1951, the United States of America owes no sum to defendants as just compensation for its failure to restore the premises to the condition in which they were received, and defendants are entitled to take nothing.”

STATEMENT OF POINTS TO BE URGED

1. The District Court's judgment denies appellants just compensation for the taking of their property in contravention of their rights under the Fifth Amendment to the United States Constitution.

2. The Court erred in holding that the United States had no liability to the appellants for its breach of its obligation to appellants to return the premises, the use and occupancy of which was taken by it, to appellants in the condition received by it on February 1, 1951, reasonable wear and tear excepted (R. 89-90).

SUMMARY OF ARGUMENT

By the two actions before this Court the United States took for the housing of Federal agencies the use and occupancy of the Flood Building from February 1, 1951, to June 30, 1954. Upon taking possession of the premises, the Gov-

ernment embarked upon a program of extensive alteration under which extensive medical-dental facilities were destroyed and the building converted to a Government office building. In the course of this program the United States appropriated for its own use thousands of dollars of fixtures, which it removed from the building.

On June 30, 1954, the United States returned the premises taken to the appellants, electing to breach its unquestioned duty to restore the premises to the condition in which they had been received on February 1, 1954. This constituted a taking by the United States separate and distinct from its taking of use and occupancy and as a consequence thereof appellants were entitled to just compensation as guaranteed by the Fifth Amendment. *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949). The "taking" effected being no different than the deprivation which occurs when a tenant breaches his covenant to surrender property in the condition received, the standard by which just compensation is assessed is the cost to the owner of doing what the Government was obligated to do. *Kimball Laundry Co. v. United States*, *supra*; *United States v. Certain Parcels of Land*, 55 F. Supp. 257 (D. Md. 1944). Thus, the constitutional guarantee of "just compensation" which is measured by a standard of "external validity" divorced from any subjective relation of the parties to the property has been uniformly held to require that the United States upon breach of its unquestioned duty pay to the landowner the reasonable cost of restoring the premises to the condition in which the Government was obligated to return them and the reasonable rental value of the premises for the period reasonably required to effect that restoration. *See e.g. United States v. 37.15 Acres of Land*, 77 F. Supp. 798 (N.D. Cal. 1948).

ogy the United States Supreme Court in a series of decisions held that the just compensation payable for use and occupancy taken under the power of eminent domain is "market rental value." *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949). However, it was evident that "market rental value" in given cases would fall short of meeting in full the constitutional requirement of just compensation. Thus, a lessor letting property receives more from his tenant than the reserved rental. In granting the use of his property a lessor's reversion is safeguarded by certain covenants arising by operation of law. Specifically, in the absence of express provision to the contrary, a tenant is under an implied duty to abstain from waste. *United States v. Bostwick*, 94 U.S. 53 (1876). This implied duty renders any alteration of the demised premises by the tenant during occupancy tortious, whether or not such unauthorized alteration enhanced the market value of the lessor's property. *Bass v. Metropolitan West Side El. R. Co.*, 82 Fed. 857 (7th Cir. 1897); *F. W. Woolworth Co. v. Nelson*, 204 Ala. 172, 85 So. 449 (1920); *Agate v. Lowenbein*, 51 N.Y. 604 (1874). *See also*: Note, 9 A.L.R. 445 (1920). Breach of such duty entitles the landlord to redress, either by injunctive relief (*Bass v. Metropolitan West Side El. R. Co.*, 82 Fed. 857 (7th Cir. 1897); *United States v. Parrott*, Fed. Cas. No. 15,998 (1858)) or by the recovery of money damages. *Isom v. Book*, 142 Cal. 666, 76 Pac. 506 (1904). A further right secures the lessor's right to have his property returned to him in the condition in which it was let. By operation of law, absent agreement to the contrary, a tenant assumes the obligation to surrender demised premises at the conclusion of his occupancy in the condition in which they were received, reasonable wear and tear excepted.

This obligation becomes an implied covenant of the lease. *United States v. Jordan*, 186 F.2d 803, 806 (6th Cir. 1951); *Lane v. Spurgeon*, 100 Cal. App. 2d 460, 223 P.2d 889 (1950). In the event that a tenant breaches this duty, a contract action lies with the landlord. See: *Appleton v. Marx*, 191 N.Y. 81, 83 N.E. 563 (1908); *Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185, 44 Atl. 612 (1899); *Shafer Bros. Land Co. v. Universal Pictures Corporation*, 188 Wash. 33, 61 P.2d 593 (1936).

Obviously, to grant the United States greater rights than a lessee obtains by the payment of "market rental value" would entail a windfall for the government and a deprivation for the owner wholly inconsistent with the constitutional guaranty of just compensation. While "market rental value" compensates the owner for the use of his property and reasonable wear and tear thereof, by definition it does not compensate for damage or destruction of the premises or for depreciation beyond reasonable wear and tear. Thus, the United States Supreme Court categorically held in *United States v. General Motors Corp.*, 323 U.S. 373, 383-384 (1945):

"For fixtures and permanent equipment destroyed or depreciated in value by the taking, the respondent is entitled to compensation. An owner's rights in these are no less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon erected. And it matters not whether they were taken over by the Government or destroyed, since, as has been said, destruction is tantamount to taking. This is true whether the fixtures and equipment would be considered such as between vendor and vendee, or as a tenant's trade fixtures. In respect of them, the tenant whose occupancy is taken is entitled to compensation for destruction, damage or depreciation in value. And since they are property distinct from the right of occu-

pancy such compensation should be awarded not as part of but in addition to the value of the occupancy as such."

The Supreme Court's holding that the confiscation and destruction of the owner's fixtures is a constitutional "taking" for which "just compensation" must be paid cannot be reconciled by any semantic ingenuity with the District Court's denial of *any* compensation whatsoever in these cases for such a "taking." The *General Motors* decision having laid at rest any doubt as to the right to just compensation for a "taking" such as that here before the Court, it is pertinent to observe that the Court in *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949), elaborated on the basis for awarding such compensation, stating:

"The courts below also awarded compensation to petitioner for damage to its machinery and equipment in excess of ordinary wear and tear, the award of rental having been adjusted to include an allowance for normal depreciation. The Government does not object to this award, but we think it appropriate to point out that we find it justified on the theory that such indemnity would be payable by an ordinary lessee though not fixed in advance as part of his rent because not then capable of determination."

Despite the Supreme Court's reference to the law of landlord and tenant as a standard for measurement of the compensation payable for the "taking" in question, the District Court professed to find a conflict in the landlord-tenant cases permitting it to follow a line of cases that in its judgment allowed a denial of any compensation for the taking before it—a result that the *General Motors* case renders impossible. Deferring for the moment consideration of the cases to which the District Court has alluded, it is

clear that the Supreme Court's reference to "such indemnity [as] would be payable by an ordinary lessee" is not a reference to a handful of cases which arguably abnegate the right to compensation for breach of a tenant's covenant. It clearly refers to the large body of landlord-tenant cases measuring a tenant's liability for breach of his covenant to surrender demised premises in the condition received by it by the cost of securing what the tenant was obligated to do. See e.g. *Storr v. Keljik*, 178 Minn. 391, 227 N.W. 211 (1929); *Braem v. Washington Piece Dye Works*, 100 N.J.L. 209, 126 Atl. 461 (1924); *Kennedy v. Loose-Wiles Biscuit Co.*, 94 Pa. Super. 602 (1929); *Abrams v. Sherwin*, 86 Pa. Super. 189 (1925); *Ventrees v. Tennessee Auto Corp.*, 5 Tenn. App. 140 (1927); *Delano v. Tennent*, 138 Wash. 39, 244 Pac. 273 (1926); *Wollard v. Schaffer Stores Co.*, 272 N.Y. 304, 5 N.E. 2d 829, 109 A.L.R. 1262 (1937); *Davis v. Allen*, 97 Utah 285, 92 P.2d 1100 (1939); *Treharne v. Klint*, 324 Ill. App. 546, 58 N.E. 2d 638 (1945); *Mackintosh v. Cioppa*, 245 Mass. 152, 139 N.E. 445 (1923); *Reinheimer v. Mays*, 75 Okla. 131, 182 Pac. 230 (1930); *Vaughn v. Mayo Milling Co.*, 127 Va. 148, 102 S.E. 597 (1920); *Cawley v. Jean*, 218 Mass. 263, 105 N.E. 1007 (1914). This rule is, of course, that dictated by basic contract concepts. 1 A.L.I., *Restat. of Contracts*, § 329 (1932). To hold that a landlord has the rights conferred by such a covenant and to deny him on breach the sum required to obtain the performance of the tenant's obligation presents the same absurdity as a holding that there has been a "taking" but that the condemnee may not receive just compensation for the property taken.

Singularly apposite to the case at bar and the District Court's willingness to allow the Government to escape its unquestioned duty by claiming that the appellant trustees suffered no "damage" by the Government's default is *Wil-*

loughby v. Atkinson Furnishing Co., 93 Me. 185, 44 Atl. 612 (1899). There a tenant, having altered demised premises to suit his taste and convenience, surrendered them to his landlord breaching his covenant to return the same in the condition received, reasonable wear and tear excepted. In an action brought for the breach of his covenant, the tenant took the position here adopted below, namely, "that the measure of damages is the injury, if any, to the market value of the property; that, if the alterations made by the lessee enhance the market value of the property, no damages would be recoverable upon this branch of the case." In rejecting the tenant's efforts to subvert his obligation and escape liability on this ground, the Court held:

"The defendant cannot say, in answer to a claim for damages for nonperformance of its covenants, that the radical changes voluntarily made by it enhanced, or did not diminish, the value of the property. The owner was entitled to exercise his own judgment as to the interior arrangement of his own building. * * * The rule as to the measure of damages is a simple one. It is the cost of doing what the defendant covenanted to do but did not do,—the cost of replacing the partitions and restoring the building to the same condition, so far as these voluntary alterations are concerned, as it was in when leased." 44 Atl. at 614.

See also: Trick v. Eckhouse, 82 Ind. App. 196, 145 N.E. 587 (1924); *Appleton v. Marx*, 191 N.Y. 81, 83 N.E. 563 (1908).

Obviously, to hold otherwise would deny the lessor the benefit of the covenant, the value of which cannot be contested by a defaulting lessor. That in some few cases courts have denied a lessor the benefit of his lessee's engagement, cannot possibly constitute a ground for denying a condemnee his constitutional right to just compensation as

enunciated by the Supreme Court in the *General Motors* and *Kimball* cases.*

II. The Decided Use and Occupancy Decisions Consonant with the Dictates of the United States Supreme Court Have Uniformly Held That the Just Compensation Payable for Takings Such as That Before the Court Is Measured by the Obligation Breached by the Government.

The District Court's denial of just compensation to the appellant trustees flies squarely into the teeth of its own conclusion that the United States "was under a duty to return those premises to the defendant trustees in the condition in which they had been received by it on February 1, 1951, reasonable wear and tear excepted" and that:

"The United States of America in returning the third through twelfth floors of the Flood Building to de-

*The District Court points to five cases which it regards as analogical authority for the denial of any compensation for the subject taking (R. 73-74). In none of those cases were factual situations comparable to that before the Court considered. *Crystal Concrete Corp. v. Baintree*, 309 Mass. 463, 35 N.E. 2d 672 (1941), was an action in equity apparently for waste, based upon the wrongful removal of a profit à prendre from unimproved land. *Fuselier v. United States*, 111 F. Supp. 471 (D. La. 1953), turned on an interpretation of a Louisiana statute, the court stressing that alterations made on 5 acres had no effect on the use or farming operations carried on on the 160-acre tract of which they were a part. In *Henry H. Cross Co. v. Rice*, 45 F.2d 940 (7th Cir. 1930), a tenant's liability for unreasonably depreciating certain refining equipment was measured by the diminution in value of that equipment. In *Georgia Kaolin Co. v. United States*, 214 F.2d 284 (5th Cir. 1954), the United States having returned demised land containing kaolin deposits, which it had impregnated with live shell, the Court refused to hold it liable for "the full money value of the kaolin deposits in the ground," the Government's liability being limited by the lease. *Realty Associates v. United States*, 138 F. Supp. 875 (Ct. Cl. 1956), is so unique that it must be read to be appreciated. Suffice it to say, the Court found the factual situation presented so extreme that it deemed Mark Twain better authority than the rules of contract law (138 F. Supp. at 878)! It is doubtful that any of these cases can be read, as the District Court has read them, to leave it to sound discretion of the trial court whether or not a lessor shall be compensated for breach of his tenant's covenant.

fendant trustees on June 30, 1954, in the condition to which they had been altered to suit its taste and convenience and without restoring the same to the condition in which they were received by it on February 1, 1951, reasonable wear and tear excepted, breached its said obligation to defendant trustees." (R. 84)

It is best characterized by the famous Holmes dictum that "Rights without remedies are ghosts that stalk across the legal stage elusive to the grasp." Suffice it to say, there is no extant authority for so emasculating the rights of a condemnee.

With the advent of temporary takings, it was recognized that public use might well necessitate alteration of premises used by the United States, and, unlike the tenant whose alterations would constitute waste, the Government upon taking temporary use was held entitled to alter premises to suit its taste and convenience. *See e.g. United States v. 14.4756 Acres of Land*, 71 F. Supp. 1005 (D. Del. 1947); *United States v. 16.747 Acres of Land*, 50 F. Supp. 389 (D. Del. 1943); *In re Condemnation of Lands*, 250 Fed. 314 (E.D. Ark. 1918). Such a concession to the exigencies of governmental use was deemed to impose no hardship on the owner, who enjoyed the right to receive his property at the conclusion of governmental use in the condition in which it had been taken, subject only to reasonable wear and tear. *See e.g. United States v. 37.15 Acres of Land*, 77 F. Supp. 798 (N.D. Cal. 1948); *United States v. 14.4756 Acres of Land*, 71 F. Supp. 1005 (D. Del. 1947). Consistent with the constitutional guaranty, this right was treated as one of substance. The landowner was entitled to have his property returned as it was taken from him or to receive as just compensation the sum required to restore it to that condition. Thus, in the first reported taking of use and

occupancy, *In re Condemnation of Lands*, 250 Fed. 314, 315 (E.D. Ark. 1918), Judge Trieber held:

"In addition to these payments [i.e. rental value], the government must obligate itself * * * that, when it surrenders the land to the owner, it will be returned to him in as good a condition as when it took possession, the natural wear and tear excepted. If the owners have been compensated in the action for the improvements, then, of course, it will not be required to replace them, or pay again for them. If the improvements, for which there has not been compensation, are not replaced, or the lands are not returned in as good condition as when the government took possession of them, natural wear and tear excepted, it is to pay such sums as damages as will enable the owner to put the land back in the condition it was, when the government took possession."

Similarly, in *United States v. 37.15 Acres of Land*, 77 F. Supp. 798 (N.D. Cal. 1948), where the United States altered the Alhwahee Hotel during temporary occupancy and returned the premises to the owner without restoration, the Court held:

"It is not, and clearly could not be, disputed that the United States was obligated to return the hotel together with its equipment and furnishings, to the owner upon the termination of the term, in as good a condition as when received, reasonable wear and tear thereof excepted. Until the United States did so return the property, both real and personal, in such condition it, of course, was liable for the fair market value of the use of the property since the taking had not yet terminated. * * * However, the government elected not to restore the premises, repair the damage caused to real and personal property lost or destroyed, but left that to be done by the owners. Therefore it would follow that the United States is liable for the reasonable cost of restoring the premises and personal

property and also for the reasonable value of the use of the premises during the period of time required to accomplish such restoration. The reasonable rental value of the premises during the period of restoration would not then be consequential damages not compensable under applicable condemnation law, but it is the very amount that the government would have been required to pay in any event during the time that it would have taken the government to have repaired and restored the premises, their furnishings and equipment." 77 F. Supp. at 802-803.

See also: United States v. Certain Parcels of Land, 55 F. Supp. 257, 264 (D.Md. 1944).

Indeed, prior to the present decision of the District Court every court faced with compensating an owner for breach of the Government's obligation deemed this liability for just compensation to "follow" from the obligation giving rise to the right to compensation. Thus, in *United States v. 266.33 Acres of Land*, 96 F. Supp. 647, 648 (W.D. Wash. 1951) rev. other grds sub nom. *Philips v. United States*, 206 F.2d 867 (9th Cir. 1953), it was observed:

"It is conceded by both parties that under the law the owner on a term-taking (i.e., less than the fee) is entitled to have the property restored to the condition it was in at the time of taking, or to receive therefor a compensatory amount which would enable him to place his property in that condition."

In *United States v. One Parcel of Land*, 131 F. Supp. 443, 446 (D. D. C. 1955), the Court stated the same principle succinctly:

"The Government at its election could make full, partial, or no restoration, being liable for the reasonable cost of whatever restoration had not been completed, less reasonable and ordinary wear and tear from normal use, and reasonable rental for the period while restoration was completed."

To adopt the position taken below that the Government has a duty to restore, that an owner whose premises are taken temporarily for public use has a right to have those premises returned in the condition in which they were taken, but that the owner has no remedy whatsoever for breach of that obligation and deprivation of that right, presents an absurdity. Indeed, an unbroken line of decisions has recognized what is indeed self evident, namely, that to give the Government's unquestioned duty substance, that duty must measure the Government's liability upon breach.* Clearly, the District Court errs when it tells ap-

*The District Court is clearly in error in stating that there are two cases "wherein the measure of damages for changes made by the government was defined in terms of the diminution in value occasioned to the premises." (R. 69-70). In *United States v. 60,000 Sq. Feet of Land*, 53 F. Supp. 767 (N.D. Cal. 1943), the United States having taken the temporary use of Hotel Oakland commenced its conversion to a military hospital. Upon pre-trial conference the question was presented "Is the *right to alter* the premises to be evaluated and compensation therefor awarded?" (53 F. Supp. at 769). The Court answered its question in the affirmative on the ground that the owner was entitled to have all compensation assessed in a single proceeding and could not be required to await the property's return. *But cf. United States v. Westinghouse Co.*, 339 U.S. 261 (1950); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949). This "right to alter," the Court ruled, would be measured by diminution of "market value." In claiming that no recovery could be had for any right to alter, the United States "contended no present detriment warrants present assessment of damages, inasmuch as the government is obligated to eventually return the property, subject to wear and tear, in its condition at the time of taking" (53 F. Supp. at 770). Indeed, the very counsel who tried this case for the government there assured the Court in his brief that detriment was impossible, since his words, "Where the Government, either pursuant to agreement or lease, or by exercise of its power of eminent domain, occupied premises temporarily and surrendered them back to the owner in a damaged condition, recovery has been allowed as for breach of covenant, rather than for damages for any tortious act."

The other case cited by the District Court is *United States v. 5,901.77 Acres*, 65 F. Supp. 454 (N.D. Cal. 1946). In permitting an amendment to a complaint the author of the *Hotel Oakland* case cited his prior decision in holding the owner suffered no detriment by the amendment. The rule which that Court held applicable

pellants that they are not damaged by the loss of their rights and that, accordingly, the Government may disregard its duty without any liability for just compensation. *Cf. Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185, 44 Atl. 612 (1899).

III. The Decision of the District Court in Fictionalizing the Government's Obligation to Appellant Trustees Not Only Permits the Sovereign to Profit by Disregarding its Citizens' Rights but Allows the Government to "Compensate" an Owner Over His Objection in Other Than Money.

Although the District Court expressly acknowledges the unquestioned duty of the United States to the appellant trustees and the breach of that duty, it denies them any compensation whatsoever. The words of the Supreme Court are indeed apposite: "If such a result be sustained, we can see no limit to utilization of such a device; and, if there is none, the Amendment's guaranty becomes, not one of just compensation for what is taken, but an instrument of confiscation fictionalizing 'just compensation' into some such concept as the common law idea of a peppercorn in the law of seizin or the later one of 'value received' in that of contractual consideration." *United States v. General Motors Corp.*, 323 U.S. 373, 381-382 (1945). Indeed, in considering the fictionalization of the duty which the District Court acknowledged, the further admonition of the *General Motors* case is relevant: "Here the use of warehouse for a short term was taken. The property might have been the General Motors factory. Or several plants. Or a modest store or home. Whatever of property the citizen has the government may take." 323 U.S. at 382.

The District Court here announces, what has never been previously suggested, namely:

to the situation presented in the instant cases is set forth in *United States v. 37.15 Acres*, 77 F. Supp. 798 (N.D. Cal. 1948), which has been discussed above.

“Where the United States of America, having taken under its power of eminent domain the right to the temporary use and occupancy of a building, alters that building and returns the same at the conclusion of its occupancy without restoring the same to the condition in which it was received, reasonable wear and tear excepted, the Fifth Amendment to the Constitution of the United States of America requires the Government to pay as just compensation for its failure to restore only the diminution in the market value of that building as of the date of its return when that sum is less than the cost of restoration.” (R. 84-85)

Honest men meet their obligations whether or not their financial self interest is thereby served. A lessor has the important right to choose as lessees only those whose integrity he trusts—a right more valuable than the right to enforce a covenant in litigation. However, a condemnee has no right to select his condemnor. The appellant trustees could not stop the United States from stripping their building, carrying off the building’s improvements, and altering the premises as it chose. They could only look to the Government to meet the obligation which it assumed and absent compliance with its obligation to the Court. However, the District Court lays down a rule that allows the Government to profit by its wrong! It is a basic concept of our jurisprudence that no man shall profit by his wrong. Compare what has here transpired. Thousands of dollars of valuable property has been removed from the Flood Building. To look at a single example, the Government removed from the Flood Building 987 doors, which even it conceded could not have been replaced for less than \$151,394.60. These doors it took for use wherever it chose. The District Court holds in effect that appellants’ doors and other equipment were a gift for which there was no cost or obligation. In short, it rewards the United States

for a default which would find condemnation in the market place. It establishes, contrary to every decision that has considered the Government's liability, a novel measure of liability upon breach of the Government's obligation, which in all cases in which the cost of improvements is not fully reflected in market value, will make breach financially preferable to discharge of that obligation. Moreover, the stated rule renders the owner's right to the return of his property in the condition in which he placed it for reasons sufficient to himself, contingent upon the plausibility of market value evidence given by experts selected to exonerate the Government's default.

While the notion that the United States should be allowed to profit from its wrong is repugnant, it is evident that the measure of liability adopted by the Court is bottomed on a glaring fallacy. The appellant trustees having been denied their rights arising under the unquestioned duty of the United States, the District Court held that "The owners here have simply failed to demonstrate that they have suffered any pecuniary deprivation" (R. 75). This result is reached because the Court concluded that on June 30, 1954, the market value of the building returned was as great as the market value of the building which it was obligated to return. Presumably, had the latter been more valuable on the date of judgment, four years after the valuation date adopted (R. 86-88), the Court would nevertheless have claimed the absence of "any pecuniary deprivation," since the owners, despite the Government's breach, received on June 30, 1954, something which presumably could have been sold on that date for as much as the building that they were entitled to receive. However, it is axiomatic that the United States cannot meet its obligation for just compensation under the Fifth Amendment by barter. 3 *Nichols on Eminent Domain* 11 (3rd ed. 1950). Consonant with the common

law rule that, absent agreement to the contrary, "payment" must be made in money, as early as *Vanhorne's Lessee v. Dorrance*, 2 U.S. (Dall.) 303, 315 (1795), it was held:

"Compensation is a recompense in value, a *quid pro quo*, and must be in money. True it is, that land or anything else may be a compensation, but then it must be at the election of the party; it cannot be forced upon him. His consent will legalise the act, and make it valid; nothing short of it will have the effect."

Cf. Collier v. Merced Irr. Dist., 213 Cal. 554, 566, 2 P.2d 790 (1931).

Since then it has been steadfastly acknowledged that under the Fifth Amendment, "Such compensation means the full and perfect equivalent *in money* of the property taken." *United States v. Miller*, 317 U.S. 369, 373 (1943). The District Court's suggestion that the measurement of just compensation by the cost of doing what the Government was obligated to do, involves the reimbursement of the owners "for particular values which they attach to the building" (R. 76) is clearly untenable. As the law of contracts predicates general damages for breach of a covenant upon the cost of securing performance of that covenant, to so measure the just compensation payable upon breach of the Government's obligation by that obligation is to adopt a standard of "external validity" in keeping with and demanded by *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949). Such is implicit in all of the prior cases addressed to breach of the Government's obligation. *See e.g. United States v. 37.15 Acres*, 77 F. Supp. 798 (N.D. Cal. 1948).

CONCLUSION

In bringing the instant actions and taking use and occupancy of the Flood Building, the United States elected to assume the obligations created by such a temporary taking.

Among these obligations was the obligation at the conclusion of its occupancy to return the Flood Building to the appellant trustees in the condition in which it had been received by the Government on February 1, 1951. Had the United States desired to avoid this obligation, it was free to take the fee and upon the conclusion of use sell the building, assuming the risks entailed in its experts' opinion of market value. Having assumed the duty to restore, the United States' breach of that obligation constituted a "taking" for which appellant trustees are entitled to "just compensation" in money. "Just compensation" cannot be paid, as the District Court assumes, by the delivery to the appellants of an altered building of equal or greater value than that taken. When the United States elects to take only "use and occupancy," the owner retains the right "to exercise his own judgment as to the interior arrangement of his own building"—even if Government witnesses believe his judgment unsound. In denying the appellant trustees any compensation for the Government's taking, the appellants have been denied their constitutional right through a fictionalization of the Government's obligation. That obligation must, as heretofore held, measure the Government's liability upon breach. To grant the owner less than the sum required to do what the Government was obligated to do, not only deprives the owner's rights of substance but allows the Government to profit by its disregard of its citizens' rights. No case could more clearly point up the evils of granting the sovereign the right to abide or not to abide by its obligations than those before the Court, where the owners have been denied not only the wherewithal to secure the performance of the Government's obligation, but have seen the Government without recompense of any kind carry thousands of dollars worth of property from their premises for use elsewhere. In short, the District Court's decision

holding that appellants have no means whatsoever of enforcing their unquestioned rights, sanctions an unconstitutional confiscation.

It is respectfully submitted that the mandate of the Fifth Amendment requires that the judgment of the District Court be reversed with direction that appellants receive as just compensation for the Government's taking the amount reasonably required to do what the Government was obligated to do but elected not to do—the reasonable cost of restoring the premises to the condition in which they were taken on February 1, 1951, and the reasonable rental value of the premises in the condition in which the Government was obligated to surrender them for the period reasonably required to effect that restoration.

Respectfully submitted,

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JOHN P. MACMEEKEN
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(Appendix Follows)

Appendix

RECORD REFERENCE TO EXHIBITS

Exhibit	Identified	Offered in Evidence	Received in Evidence	Exhibit	Identified	Offered in Evidence	Received in Evidence
A		113	113	H-13		104	104
B		122	122	I		107	107
C		121	121	J		107	107
D		122	123	K		107-8	108
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F-5		97	97	Q		116	116
F-6		97	97	R		123	123
F-7		97	97	S		125	125
F-9		97	97	T		126	126
F-10		97	97	U		127	127
F-11		97	97	V		128	128
F-12		97	97	W		129	129
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F-22		99	99	AE	150		
G		102	102	AF		151	151
G-1		99	99	AF-1		172	172
G-2		99	99	AG		154	154
G-3		99	99	AG-1		156	156
G-4		100	100	AH		159	159
G-5		100	100	AI		161	161
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G-7		102-3	104	AK		171	171
H-1		100	100	AL		176	176
H-2		100	100	AM		177	177
H-3		100	100	AN		178	178
H-4		100	100	AO		179	179
H-5		101	101	AP		182	182
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H-8		101	101	AS	—	—	—
H-9		101	101	AT	—		
H-10		101	101	AU	—		
H-11		101	101	AV	413		
H-12		101	101	AW		—	—

Appendix

Exhibit	Identified	Offered in Evidence	Received in Evidence	Exhibit	Identified	Offered in Evidence	Received in Evidence
AX-1		—	—	19	—	234	234
AX-2		—	—	20	234	234	235
1		—	—	21	235	236	236
2	—	218	218	22	236	237	237
3	—			23	237	238	238
4	—	—	—	24	—	238	238
5	—			25	239	240	240
6	—			26	240	241	241
7	—	—	—	27A	241	242	242
8	203	204-5	205	27B	241	242	242
9	—	—	—	28	—		
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16B	—	231	231	43	450		
17	232	232	232	44		—	—
18	232	233	233	45		—	—

**In the United States Court of Appeals
for the Ninth Circuit**

**JAMES FLOOD and MARY EMMA STEBBENS, as
Trustees of the Trust created by Paragraph
III of the Last Will of James L. Flood,
deceased, APPELLANTS**

v.

UNITED STATES OF AMERICA, APPELLEE

**Appeal from the United States District Court for the
Northern District of California, Southern Division**

BRIEF FOR THE UNITED STATES, APPELLEE

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FILE

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 16224

JAMES FLOOD and MARY EMMA STEBBENS, as
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III of the Last Will of James L. Flood,
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v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the
Northern District of California, Southern Division

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The opinion of the district court (R. 62-77) is reported at 157 F.Supp. 438. The findings of fact and conclusions of law appear in the record at pages 77-85.

JURISDICTION

The United States instituted these condemnation actions to acquire a temporary interest in property owned by appellants (R. 1-14, 33-41). The acquisition was under authority of the Public Buildings Act

of August 27, 1935, 49 Stat. 886 (40 U.S.C. sec. 304c), as amended by the Act of June 14, 1946, 60 Stat. 257; the Federal Property and Administrative Services Act of June 30, 1949, 63 Stat. 377; and the General Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. sec 257 (R. 4). Judgment of the district court was entered June 10, 1958 (R. 86-88). Notice of appeal was filed August 7, 1958 (R. 88). The jurisdiction of the district court rested on 28 U.S.C. sec. 1358. The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

QUESTION PRESENTED

The United States condemned the right to occupy a building for three and one-half years. It made alterations to adapt it for use as a federal office building. The question is:

Whether, upon return of the property to the owner, the United States must pay, in addition to a fair market rental, the cost of restoring the building to its original condition even though the alterations caused no diminution in its fair market value.

STATEMENT

The United States filed a complaint in condemnation on January 29, 1951, to acquire the right to use and occupy for federal office space a building owned by appellants for a term commencing February 1, 1951, and ending June 30, 1951, extendible for yearly periods up to June 30, 1955 (R. 1-7). An order granting the right to possession on February 1, 1951, was entered on the same day (R. 8-9). The build-

ing is known as the Flood Building located at 870 Market Street in San Francisco, California (R. 12). It contains 12 stories and a basement. On May 15, 1951, possession of the ground floor and substantially all of the basement area was returned to appellants (R. 9-11, 78).

To reflect that change in the space occupied, the United States did not extend the original term taken but filed a new complaint on June 29, 1951, to acquire use and occupancy of the building, less the portions surrendered, for a term commencing July 1, 1951, and ending June 30, 1952, extendible for yearly periods until June 30, 1956 (R. 33-38). On September 28, 1951, possession of the second floor was returned to appellants (R. 39-42, 78). The Government remained in possession of the upper 10 floors of the building until June 30, 1954 (R. 64).

The two cases were consolidated for trial on the issue of compensation (R. 17). The parties agreed upon the compensation to be paid for the use and occupancy of the premises, i.e., the reasonable rental value for the 41 months that the Government was in possession (R. 18, 45, 78), and final judgments were entered on October 21, 1954, fixing the compensation in the agreed amounts (R. 23, 50).

The parties were not able to agree, however, on the compensation owing, if any, by reason of the failure of the Government to restore the premises to the condition in which they were at the time of the taking, ordinary wear and tear excepted. Appellants contended that the Government was required to restore the building to its original condition and

that, in electing not to restore it, the Government became liable for the reasonable cost of restoration, plus rental for the period required to restore it (R. 64-65). The Government insisted that the owners have no immutable right to the cost of restoring the building, that just compensation is satisfied by paying them the diminution in market value of the property, if any, caused by the Government's alterations (R. 65). Accordingly, the rental value judgments recited that jurisdiction was retained to try that issue (R. 32, 61, 79).

At the trial before the court, it was established that prior to the Government's occupancy the top six floors had been rented almost exclusively to medical and dental tenants and that the remaining floors, except the ground floor (stores), were used for general office occupancy (R. 80). The Government made extensive alterations at a cost of \$225,000 (R. 80-81). As the court found (R. 81): "The final result achieved by such remodelling was to change the medical and dental suites into large offices adapted to general office usage."

Appellants estimated that the cost of restoring the building to its condition as of February 1, 1951, would be \$600,600 (R. 65). The Government, while opposing the requirement of restoration, put the cost at \$401,000 (R. 65). Both figures were based on new materials without reflecting depreciation. In addition, appellants claimed \$178,000 as reasonable rental value for the period required to restore (R. 65). The Government fixed a shorter term and valued it at \$40,000 (R. 66).

The district court concluded that the Government "was under an obligation to return" the premises in the condition in which they had been received by it, reasonable wear and tear excepted, and that it had "breached its said obligation" (R. 84). Then, in ascertaining the compensation owing because of the breach, the court found the following facts (R. 81-83):

IX.

When plaintiff took possession of the building on February 1, 1951, it did not disrupt a going medical-dental operation, since defendants had themselves theretofore caused all the medical and dental tenants, and all other tenants, in the building to vacate.¹

X.

Upon resuming possession of said Flood Building on July 1, 1954, defendants embarked on a campaign to rent space in said building for multiple general office purposes as distinct from medical-dental. This campaign was singularly effective, for by January, 1956, the office space in the building was ninety to ninety-five percent occupied by general office tenants. No effort whatever was made by defendants to secure medical-dental tenants.

XI.

The net return before insurance and depreciation, for the third through the twelfth floors of

¹ As explained in the court's opinion (R. 63), the property had been leased to F. W. Woolworth Company, effective February 1, 1951. That Company was going to demolish the existing building and erect a new one.

said Flood Building, as of January, 1956, for its then use of general office occupancy was \$1.55 to \$1.60 per square foot per year, or approximately \$85,000 greater than the net return of \$1.05 per square foot per year, for the second through the twelfth floors, for the best year of the Flood Building's history, while operated as a medical-dental building.

XII.

In 1951, and for some years before, the Flood Building had ceased to be competitive in the medical-dental tenancy field, with the new and modern medical-dental office buildings in San Francisco, which were especially designed for use by physicians and dentists, such as the Fitzhugh Building, and the 490 Post Street Building and the 450 Sutter Street Building.

XIII.

At the time possession of the Flood Building was turned back to defendants on June 30, 1954, the condition set forth in Paragraph XII continued to exist, and was, if anything, aggravated by a considerable movement during the years 1953 and 1954 of tenants from medical buildings in downtown San Francisco to outlying and suburban areas.

XIV.

The three hundred or more medical and dental tenants which defendants caused to vacate the Flood Building in 1950 and 1951, had reestablished themselves in other buildings in downtown San Francisco and outlying suburban areas, in

most instances at great expense to themselves, before June 30, 1954, and that prospective market was lost forever to defendants.

XV.

The highest and best use of the Flood Building, as of the date of its return to defendants, namely, June 30, 1954, was no longer for medical and dental tenancies, but rather for multiple general office usage.

* * * *

XVII.

The Flood Building suffered no diminution in market value by reason of the plaintiff's taking, or the changes made by the Government during its occupation. The fair market value of the building when returned on June 30, 1954, was as great as it would have been had it been returned on that date in the condition in which it was taken in 1951.

The court held (R. 75-76) that: "The criteria which has long been held to measure just compensation is that the owner is entitled to be put in as good position pecuniarily as he would have occupied if his property had not been taken. * * * The owners here have simply failed to demonstrate that they have suffered any pecuniary deprivation. For them to demand that the public is obliged to pay them almost a half a million dollars, which would presumably be used to re-install the medical-dental facilities, though their building continued to be as valuable as it was prior to the government taking, is to reimburse them for the particular values which they attach to the

building.” Accordingly, judgment of no compensation for this aspect of the taking was entered on June 10, 1958 (R. 88). This appeal followed (R. 88).

SUMMARY OF ARGUMENT

I

There are fundamental differences between the rules of law governing property occupied under lease-contract and eminent domain. One is consensual, the other is not. The purpose of contract actions is to enforce particular promises or intentions derived from express provisions throughout the instrument. There are no such promises or intentions in the exercise of eminent domain. Thus, while contract law may be consulted in determining the compensation owing for a temporary taking, the difference must be borne in mind with respect to particular cases and the analogy must stop where it impinges upon settled principles of eminent domain law.

In any event, the federal rule is that, even when property under lease is returned without restoring it to its original condition (ordinary wear and tear excepted), diminution in market value of the property caused by the failure to restore is the measure of damages. In instances where the cost of restoration has been awarded it was, in fact, awarded as evidence of or the measure of the diminution in market value. Accordingly, appellants, whose property has not been diminished in market value, are not

entitled to restoration costs by analogy to the law governing lease contracts.

II

Independently, settled principles of eminent domain law prohibit compensation in excess of diminution in fair market value. The compensation to which a condemnee is entitled means that he shall be put in as good a position pecuniarily as he would have been if his property had not been taken. The sum does not depend upon the uses to which he has devoted his property but is to be arrived at upon just consideration of all the uses for which it is suitable. It is the property that is safeguarded by the Constitution and not the subjective desires or uses of the owner. Following those principles, the federal courts have held that where the United States has caused injuries to property temporarily taken, for which it is liable in addition to the fair rental value, the measure of the additional liability is the amount by which such injuries diminish the fair market value of the property. The costs of restoration may be evidence of the amount of the decreased market value but they may not be awarded if they exceed the diminution in such value.

III

Moreover, the building had ceased to be a going medical-dental operation at the time of the Government's taking since the owners had themselves vacated all such tenants in contemplation of demolition. Therefore, under the facts as found by the

trial court, there is no basis for imposition upon the United States of a duty to re-create that medical-dental operation.

ARGUMENT

I

APPELLANTS ARE NOT ENTITLED TO RESTORATION COSTS BY ANALOGY TO LAW GOVERNING LEASE CONTRACTS

Appellants' building was occupied by the United States under the power of eminent domain, not under lease-contract. While the contractual relationship of a landlord and tenant may be consulted in some of its aspects in determining the compensation owing for a temporary taking, the analogy to contract in an eminent domain matter must stop where it impinges upon settled principles of eminent domain law. *United States v. Certain Parcels of Land in Philadelphia*, 86 F.Supp. 676, 677 (E.D. Pa. 1949). "The owner's right does not depend on contract, express or implied." *Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 304 (1923). The difference between the two is fundamental and great. One is consensual, the other is not. The analogy fails, for example, where the Government enters into possession under lease, erects permanent improvements and then condemns the fee. Ordinarily, such improvements by a tenant become the property of the landlord at the time they are affixed to or incorporated in the realty. That is not true under eminent domain law when they have been erected by the Government or a corporation having eminent domain power. Thus, in

Bibb County, Georgia v. United States, 249 F.2d 228 (C.A. 5, 1957), the court said (p. 230):

* * * appellant takes too restricted a view of the facts as a whole and of the controlling equitable principles and, by a bare bones argument which presents the case as a mere controversy between a Georgia landlord and tenant over fixtures, strips it of its life giving, its flesh and blood, elements. * * * it would be a clear perversion of justice to permit the invocation of the dry as dust legal principles as to fixtures controlling the relation of an ordinary landlord and tenant; * * * When the United States or other governmental body has constructed improvements upon land not owned by it but of which it is in possession under circumstances such as this case presents, and brings proceedings to condemn the fee of the land, the equitable principle which condemns unjust enrichment prevents the value of these premises becoming a windfall to the owner of the land in the guise of fair compensation.

To the same effect are: *Searl v. School District, Lake County*, 133 U.S. 553, 562 (1890); *Anderson-Tully Co. v. United States*, 189 F.2d 192, 196 (C.A. 5, 1941), cert. den. 342 U.S. 826; *United States v. Smith*, 110 Fed. 338, 340 (E.D. N.Y. 1901); *Norfolk & O. V. Ry. Co. v. Consolidated Turnpike Co.*, 111 Va. 131, 68 S.E. 346 (1910), affirmed under reverse title, 228 U.S. 596 (1913); 34 A.L.R. 1083; L.R.A. 1916 F. 980. Cf. *Old Dominion Co. v. United States*, 269 U.S. 55 (1925).

Another instance where the analogy must fail would be "a speculative and exorbitant price" paid

for property or a high value fixed because of a "unique need" for it or an "idiosyncratic attachment" to it. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949); *Olson v. United States*, 292 U.S. 246, 255 (1934). As stated in the former case (p. 5), "such personal and variant standards as to value" must yield in eminent domain to a "transferable value [that] has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use."

Appellants purport to rely on that concept and urge its enforcement here (Br. 17, 33). Plainly, however, the factual situation presented shows that appellants are seeking, as the district court noted (R. 76), reimbursement "for the particular values which they attach to the building" rather than the objective, "transferable value" of "external validity" in the market place.

In instances of taking for a term, the analogy to contract may be used in ascertaining the extent of the taking (the owner's loss). Certainly, as in the case of a lease contract, the owner has sustained pecuniary loss not compensated by the "fair market rental" if his property is damaged beyond ordinary wear and tear. A value inhering in his property has been taken from him *pro tanto* and he is entitled to be paid for that loss. This would undoubtedly be true without reference to contract law but the analogy is helpful in showing that the courts recognize the substantiality of such a loss by finding an implied covenant to indemnify for it in lease contracts

where a contrary intention is not express. A danger is present, however, in relying on particular cases because essentially a contract action is to enforce particular promises or intentions derived from express provisions throughout the instrument flowing from the mutual intent of the parties. Thus, an implied covenant not to commit waste may be enlarged by an express covenant to keep in good repair and the latter may be treated differently from a covenant to return in as good condition as received which, in turn, may be distinguished from a covenant to return in the same condition, etc., and all depend upon the general intention of the parties under the particular facts. E.g., *Henry H. Cross Co. v. Rice*, 45 F.2d 940, 943 (C.A. 7, 1931); *Ten-Six Olive v. Curby*, 208 F.2d 117, 122 (C.A. 8, 1953).

As to the measure of indemnification or compensation, again reference may be made to contract law but only to the extent that it does not conflict with settled principles of eminent domain law and always subject to the warning that each contract ruling seeks to ascertain and enforce the intention of the parties in a consensual transaction. In a conventional lease, a tenant may covenant to maintain the property in good repair. 32 Am. Jur., Landlord and Tenant, sec. 788; 51 C.J.S., Landlord and Tenant, sec. 409. But in the absence of an express covenant, he impliedly covenants only against waste. *United States v. Bostwick*, 94 U.S. 53 (1876); *New Rawson Corporation v. United States*, 55 F.Supp. 291, 294 (Mass. 1943); 32 Am. Jur., Landlord and Tenant,

sec. 779; 51 C.J.S., Landlord and Tenant, sec. 408. Waste may include substantial injury for lack of essential repair and substantial alterations not consented to. 4 Thompson, *Real Property* (1940 ed.), secs. 1608 and 1615. "Damages for waste are usually measured by the injury actually sustained by the inheritance, the diminution of the market value caused by the injury." 4 Thompson, *Real Property* (1940 ed.), sec. 1622; *Campeau v. Hobbs*, 259 Mich. 93, 242 N.W. 850 (1932); *Winans v. Valentine*, 152 Ore. 462, 54 P.2d 106 (1936); *In re Stout's Estate*, 151 Ore. 411, 50 P.2d 768, 101 A.L.R. 672 (1935). "If the injury is easily reparable, the cost of repairing may be recovered. But it must be shown that the repairs were reasonable; and if the cost of repairing the injury is greater than the diminution in market value of the land, the latter is always the true measure of damages. Strictly speaking, therefore, the cost of repairs is not the measure of damages but only evidence of the amount of damages." III Sedgwick, *Damages* (9th ed., 1920), pp. 1918-1920, sec. 932.

Thus, in *Realty Associates, Inc. v. United States*, 134 C.Cls. 167, 138 F.Supp. 875 (1956), the Government leased textile mill property for four years. During its occupancy, the Government spent more than \$558,000 in modernizing and improving the property. The owner sued for damages for failure to restore the property to the same condition that existed at the beginning of the lease, there being a provision in the lease requiring it. The court held that the owner's insistence upon technical applica-

tion of the lease provision was untenable in view of the greatly increased value of the property resulting from the Government's improvements. The court said (134 C.Cls. at pp. 171-172):

If this were a suit for specific performance, the plaintiff might well compel the defendant to actually restore the property to the status and condition which prevailed in May 1943, upon the performance of which the property would again become practically useless.² I am sure the plaintiff would not have thought of instituting such a suit because it is inconceivable that it would have wanted the property restored to its previous condition which had produced years of idleness. In the light of the entire record it is difficult to believe that plaintiff in good faith wanted any of the items restored.

To hold that in spite of the vast increase in the value of the property and the lack of damage caused by any action of the defendant, the plaintiff nevertheless is entitled to recover in addition to the mythical cost of restoring the property is inconceivable. To hold that the technical wording of the lease would justify an award of \$220,000, or anything like that amount in damages which are practically nonexistent, runs counter to every tenet of justice and fair play which we have known from our youth up.

² We doubt whether any equity court would order such a useless and wasteful act. In any event, the United States has not consented to specific relief but only for money damages. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 704 (1949). Appellants' claim, which is beyond actual damage suffered, amounts to an assertion of a right to specific relief.

Plaintiff takes a simple technical wording of a lease, carries it along the road to a pure legalism, and from there on to an absurdity. Somewhere along the way the spirit of the law is lost, falls into a dreamless sleep, and lies in an unmarked spot.

* * * *

* * * We suppose it is as natural for a human institution to look after its own interests as it is for the sparks to fly upward, but in order to justify recovery in this case the plaintiff must show actual damages by virtue of the breach of the contract which, in our judgment, it has not shown.

In *Georgia Kaolin Co. v. United States*, 214 F.2d 284 (C.A. 5, 1954), cert. den. 348 U.S. 914, the Government occupied land under a transferred lease which contained a provision obligating the Government as the sublessee to restore the premises to the same condition as that existing at the date of the lease, reasonable and ordinary wear and tear and damage by the elements excepted. The United States used the land for a target area and the property was impregnated with live shells and explosives to such an extent that the plaintiff could not thereafter use the property for mining purposes. The plaintiff asserted that it had acquired the property for the purpose of mining kaolin and that the Government had breached its contract by failing to restore the premises to their original condition. The plaintiff sought to recover the value of the kaolin in the ground. The court of appeals held that the measure of damages is one of law and that the plaintiff was

entitled to recover the difference between the value of the land at the time of the lease and its diminished value because of its use and the condition in which it was returned to the owner.

In *Fuselier v. United States*, 111 F.Supp. 471 (W.D. La. 1953), the plaintiffs sought to recover \$3,890 as the cost of removing concrete emplacements and earthen works constructed on their property by the United States under a lease. The proof established that it would cost \$3,890 to remove those facilities and to restore the premises. The Government, however, proved that the damage, if the concrete emplacements and earthen embankments remained, would not exceed the sum of \$55 an acre for only 5.53 acres of the 154 acres under lease. The lease did not expressly obligate the United States to remove the structures or to restore the premises. However, the court noted in its opinion (p. 473) that the "plaintiffs contend it arises by necessary implication, which, for the purposes of this case, may be conceded." The court noted further that:

* * * Clearly the expenditures of \$3890 would add only about \$300 to the value of the property for any purpose for which it was fitted at the time of the expiration of the lease and breach of the contract.

The plaintiffs can now use the property, except the small acreage indicated, for all purposes for which it was available prior to the lease and to allow recovery of the cost of removal would simply result in their enrichment to the extent of some \$3,500 in excess of the actual loss, which they could spend or not as they saw fit for removing the obstructions.

Accordingly the court held that the plaintiffs were (pp. 473-474) :

* * * entitled to judgment for 5.53 acres at \$55 per acre as damages to the land due to the failure to remove obstructions and the value of the timber and other expenditures for changing the irrigation are stipulated in the record.

In *Crystal Concrete Corp. v. Town of Braintree*, 309 Mass. 463, 35 N.E. 2d 672 (1941), the Town leased land with the right to remove sand and gravel. The lease permitted removal only to a certain depth and required smoothing off the surface where the excavating had been performed. The owner sued for damages for breach of the latter agreements. The court said (pp. 469-471) :

The plaintiff is seeking not specific performance but damages. It is entitled to be put in the same position that it would be in if the Town had performed the terms of the lease. * * *

A lessee who breaches a provision of the lease requiring him to make certain repairs or to deliver up the premises at the termination of the lease in a certain condition is liable in damages for the reasonable cost of making such repairs or of putting the premises in the condition prescribed by the lease [citing cases] but the plaintiff is not to be put in a better position than it would have been if the defendant had performed the terms of the lease. The location and character of the demised premises must be considered; and the reasonable cost of repairs, in some instances, would furnish the proper measure of damages while in other instances the value of the premises may be such that the in-

currence of expense for repairs would not be a reasonable, practical, or economical method of dealing with the property. Such expense might greatly exceed any diminution of the fair market value of the loss that was caused by the defendant's nonperformance of the provisions of the lease. * * * The diminution in the fair market value of the premises that resulted from the defendant's conduct was the proper measure of damages. The cost of repairs would be competent evidence of this difference in value, but the location and physical character of the premises as set forth by the master would not warrant charging the defendant with several thousand dollars in excess of this difference in refilling and grading the 3 acres where excavating had been performed.

To the same effect are: *Henry H. Cross Co. v. Rice*, 45 F.2d 940, 943 (C.A. 7, 1931); *Zoslow v. National Savings & Trust Co.*, 91 U.S. App. D.C. 391, 201 F.2d 208 (1952); *Gardner v. Darling Stores Corp.*, 242 F.2d 3, 7, 63 A.L.R.2d 1105 (C.A. 2, 1957); *In re Jewell*, Fed. Cas. No. 7302 (S.D. N.Y. 1879); *Cecil v. United States*, 67 C.Cls. 398 (1929); *Eastern Steamship Lines, Inc. v. United States*, 125 C.Cls. 422, 112 F.Supp. 167 (1953); *Eaddy v. United States*, 134 C.Cls. 338, 342, 139 F.Supp. 49 (1956); *Murray v. Patterson*, 18 Tenn. App. 30, 72 S.W.2d 559, 564 (1934); *Hickman v. Wellauer*, 169 Wis. 18, 171 N.W. 635 (1919); *Zindell v. Central Mutual Ins. Co.*, 222 Wis. 575, 269 N.W. 327 (1936); see also cases discussed in 123 A.L.R. 515 ff. and 61 Harv. L. R. 113, 154, and compare *Erceg v. Fairbanks Exploration Co.*, 95 F.2d 850, 852-853 (C.A. 9,

1938), cert. den. 305 U.S. 615; *Carr v. United States*, 28 F.Supp. 236 (W.D. Ky. 1939). The United States Court of Claims, as recently as July 13, 1959, has re-affirmed its position, stating in *Janice N. Spitzel v. United States*:³

The plaintiffs contend that the measure of damages should be the cost of restoring the land to the condition it was in when the defendant first took possession. But this court has held that where the cost of restoration exceeds the diminution in the fair market value, as in the case at bar, the measure of damages shall be the diminution in the fair market value.

While federal law governs such matters affecting the "essential interests" of the United States (*United States v. 93.970 Acres of Land*, — U.S. — (June 22, 1959); *United States v. Miller*, 317 U.S. 369, 379 (1943); *Riverview Properties v. United States*, 102 F.Supp. 934, 937 (M.D. Pa. 1952)) the foregoing is plainly the law between individuals in California where appellants' property is located. *Avery v. Fredericksen & Westbrook*, 67 Cal.App. 334, 154 P.2d 41 (1945). Thus, just as the federal rule is that to permit recovery of "the mythical cost of restoring the property is inconceivable" where it vastly exceeds diminution in market value (*Realty Associates, Inc. v. United States*, 134 C.Cls. 167, 171, 138 F.Supp. 875 (1956)), so also in California the cost of restoration is not the measure of damages where such cost "may far exceed any injury result-

³ Copies of this unreported opinion have been filed with the clerk.

ing from it in its present condition, and in that case it is not probable that the amount recovered would ever be used for that purpose.” (*DeCosta v. Massachusetts Mining Company*, 17 Cal. 613, 617 (1861).

Therefore, the court below in the present case correctly held that, even under an express covenant to restore, the tenant has no “immutable duty to pay the costs of restoration” (R. 73, 75) and that such costs are to be considered only if the “property is of such a kind that damage or destruction deprives it of its ordinary utility, and economic necessity dictates that it be restored to its original condition” in which events “the cost of restoring it would approximate the diminution in market value suffered” (R. 71).

II

APPELLANTS ARE NOT ENTITLED TO RESTORATION COSTS UNDER PRINCIPLES OF EMINENT DOMAIN LAW

When property is taken by eminent domain “The compensation to which the owner is entitled * * * means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. * * * The owner’s right does not depend on contract, express or implied.” *Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 304 (1923); *United States v. New River Collieries Co.*, 262 U.S. 341, 343; *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893). In *Olson v. United States*, 292 U.S. 246, 255 (1934), the court said:

That equivalent [for the property taken] is the market value of the property at the time of

the taking contemporaneously paid in money. * * * It may be more or less than the owner's investment. * * * He is entitled to be put in *as good a position pecuniarily* as if his property had not been taken. *He must be made whole but is not entitled to more.* It is the property and not the cost of it that is safeguarded by state and federal constitutions. * * *

Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. *The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable.* [Emphasis supplied.]

In *United States v. Miller*, 317 U.S. 369, 373-375 (1943), the court said:

* * * The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.

It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, *the courts early adopted, and have retained, the concept of market value.* * * *

* * * It is usually said that market value is what a willing buyer would pay in cash to a willing seller. * * *

[There are] elements which * * * must in fairness be eliminated in a condemnation case, as where the formula is attempted to be applied as between an owner who may not want to part

with his land because of its special adaptability to his own use, and a taker who needs the land because of its peculiar fitness for the taker's purposes. These elements must be disregarded by the fact finding body in arriving at "fair" market value. [Emphasis supplied.]

It is plain, therefore, that the Government is liable solely for loss of value inherent in the property. It is "the property * * * that is safeguarded by state and federal constitutions" (*Olson, supra*) and not the subjective desires or "uses" of the owner (*Olson, Miller, supra.*). "[O]nly that 'value' need be considered which is attached to the 'property' * * *." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949). That is true, as shown in the latter case (p. 5), because the source and requirement of compensation is the Fifth Amendment which provides: "nor shall private property be taken for public use, without just compensation," and that has always been construed to mean: "just compensation for such property," because the property is all that the Government acquires and frustration of the owner's personal plans "is properly treated as part of the burden of common citizenship." This is further shown by the fact that, unlike a contract action, which is personal, condemnation is a "proceeding *in rem*" and "a taking, not of the rights of designated persons in the thing needed but of the thing itself, with a general monition to all persons having claims in the thing." *United States v. Dunnington*, 146 U.S. 338, 352-353 (1892). "The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available

uses and purposes." *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 81 (1913).

Following those principles, the federal courts have held that where the United States has caused or permitted injuries to property temporarily taken, for which it is thus liable to the condemnee in addition to the fair market value, the measure of this additional liability is the amount by which such injuries diminish the fair market value of the property. *United States v. Jordan*, 186 F.2d 803, 805-807 (C.A. 6, 1951), affirmed by equally divided court, 342 U.S. 911 (awarded stumpage value for timber only of merchantable size where all standing timber destroyed); *United States v. 5,901.77 Acres of Land in Marin County*, 65 F.Supp. 454, 456 (N.D. Cal. 1946); *United States v. 60,000 Square Feet of Land, Etc.*, 53 F.Supp. 767, 771 (N.D. Cal. 1943). Accord: *United States v. 37.15 Acres of Land in Mariposa County*, 77 F.Supp. 798, 803-804 (N.D. Cal. 1948) (no recovery for destruction of mural decoration, where market value was not reduced and decoration was not restored by condemnee). Cf. *United States v. General Motors Corp.*, 323 U.S. 373, 384 (1945) (tenant may recover for "depreciation in value" of his fixtures, etc.)

If it is feasible and reasonable to repair the damage and restore the property to the condition in which it should have been at the end of the term taken, the reasonable cost of such restoration may be taken as indicating the amount by which the damage reduced the value of the property, and in such cases is sometimes loosely referred to as the measure of

compensation. E.g., *United States v. 37.15 Acres of Land in Mariposa County*, 77 F.Supp. 798, 802-803 (N.D. Cal. 1948); *United States v. Certain Parcels of Land in Los Angeles County*, 63 F.Supp. 175, 188 (S.D. Cal. 1945); *In re Condemnation of Lands for Military Camp*, 250 Fed. 314, 315 (E.D. Ark. 1918); *New Rawson Corporation v. United States*, 55 F. Supp. 291, 293-294 (Mass. 1943) (conventional lease). In *Kimball Laundry Co. v. United States*, 166 F.2d 856, 861, 863 (C.A. 8, 1948), reversed on other grounds but approved as to this point, 339 U.S. 1, 7, the court used "depreciation in value" and "costs of restoration" indiscriminately in describing the measure of liability. However, as required by the basic principles of eminent domain law, the true measure in all cases is the diminution in market value, a distinction which stands out in cases where changes in the property diminish its value less than the cost of restoration, or not at all, or even enhance its value. Thus, in *United States v. 37.15 Acres of Land in Mariposa County*, 77 F.Supp. 798 (N.D. Cal. 1948), the court awarded the costs of restoration of items necessary to resume operation of a hotel in Yosemite National Park (the only permissible use) undoubtedly as the fair measure of diminution in the market value of the property, because in refusing compensation for other items damaged or destroyed the court said (p. 804):

The alleged damage to the stucco walls and stencils in no way affects the functioning or utility of the premises as a hotel. * * * Against the background of principles applicable to the

payment of compensation in condemnation causes, no basis can be found upon which to admeasure compensation. There is no evidence that the market value of defendant's interest in the property as a going hotel has been lessened. Nor does it appear from any evidence that the defendant plans or expects to make any further expenditure of a restorative character as to the walls or stencils. Neither does it appear from any evidence that there is any lessening or decreasing in business income affecting the rental value of the property. Consequently I find no justification in law or in the evidence for calculating or allowing, upon such a speculative or conjectural basis as is here presented, any award for damages with respect to the stucco walls or stencils.

The federal decisions relative to condemnation, relied upon by appellants, do not announce another rule nor support their position. Thus, in *Bass v. Metropolitan West Side El. R. Co.*, 82 Fed. 857, 864 (C.A. 7, 1897), an injunction suit, the court did not attempt to "estimate the compensation which, in a proceeding to condemn, should be awarded the appellant." It is significant that, although suggesting that if the defendant railroad company did not condemn the building which it had damaged it might be required to restore the building, the court refrained from ruling that restoration cost would be the measure of compensation in the condemnation action even though the question of such measure was raised. In *United States v. 14.4756 Acres of Land*, 71 F. Supp. 1005 (Del. 1947); *United States v. Certain Parcels of Land in Baltimore*, 55 F.Supp. 257 (Md.

1944); and *In re Condemnation of Land for Military Camp*, 250 Fed. 314 (E.D. Ark. 1918), the only issue was whether the court would retain jurisdiction until possession was relinquished by the condemnor to determine restoration damage. When the court used, in those decisions, the words "jurisdiction to determine the cost of restoration" or similar ones, it was plainly applying a descriptive label to the issue rather than attempting to define the measure of the liability. In *United States v. 266.33 Acres of Land*, 96 F.Supp. 647 (W.D. Wash. 1951), reversed on other grounds *sub nom. Phillips v. United States*, 205 F. 2d 867 (C.A. 9, 1953), the measure of damages was expressly not in issue (p. 648). The sole issue was whether the district court or the Court of Claims had jurisdiction to hear restoration damage. In *United States v. One Parcel of Land*, 131 F.Supp. 443 (D.C. 1955), "the Government wished to make at least a partial restoration of the property, which it proceeded to do" and terminated its tenancy by a notice which expressly reserved "the right of the owners to claim the reasonable cost of restoration of the premises and reasonable rent during the period of restoration" (p. 444).

Thus, appellants rely upon language from decisions taken out of context and which plainly were not rulings upon the issue presented here. Equally without force for the same reason is appellants' reference to authorities which announce that compensation under the Fifth Amendment "must be paid in money" (Br. 32-33) in an effort to establish that the Government may not discharge its liability by returning an al-

tered property of equal value to that taken. Appellants refer to this as compensation "by barter" (Br. 32). But the principal case upon which they rely, *United States v. Miller*, 317 U.S. 369 (1943), held that if the taking by the Government of part of a tract "has in fact benefited the remainder, the benefit may be set off against the value of the land taken" (p. 376). See also: *Bauman v. Ross*, 167 U.S. 548, 570 (1897); *Reichelderfer v. Quinn*, 287 U.S. 315, 323 (1932); *United States v. Grizzard*, 219 U.S. 180, 185-186 (1911); *Aaronson v. United States*, 79 F.2d 139, 140 (App.D.C. 1935); *United States v. Mills*, 237 F.2d 401 (C.A. 8, 1956); *United States v. 2,477.79 Acres of Land in Bell County, Texas*, 259 F.2d 23, 27-28 (C.A. 5, 1958). The question is whether, in the entire transaction, the landowners have been pecuniarily damaged.

III

THE UNITED STATES IS NOT REQUIRED TO PAY APPELLANTS FOR A USE WHICH THEY HAD ABANDONED PRIOR TO THE TAKING

As the district court found (R. 81; *supra*, p. 5) and stated in its opinion (R. 71): "When the Government seized these premises in 1951, it did not disrupt a going medical-dental operation, but seized the building after the owners had themselves vacated all the medical tenants in contemplation of demolition." Therefore, there is no basis for imposing a duty upon the United States to restore that medical-dental operation.

Also, as the court said (R. 71): "The changes effected by the government after taking possession

did not wreak havoc and destruction to the interior; what was accomplished was that the offices were converted to general office space." In these circumstances, there is no valid reason for departing from the settled rule in condemnation that a property is to be valued having in mind "all the uses for which it is suitable." *Olson v. United States*, 292 U.S. 246, 255 (1934).

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court was correct and should be affirmed.

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No. 16,224

In the

United States Court of Appeals

For the Ninth Circuit

JAMES FLOOD and MARY EMMA STEBBINS,
as Trustees of the Trust created by
Paragraph III of the Last Will of
James L. Flood, Deceased,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellants' Reply Brief

On Appeal from the United States District Court for the
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In the
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UNITED STATES OF AMERICA,

Appellee.

Appellants' Reply Brief

On Appeal from the United States District Court for the
Northern District of California

Introduction

The Brief of the United States illustrates the difficulties that inhere in the judgment below. The Government does not deny that it has taken valuable property of the appellant-trustees. By its own evidence the cost of replacing that property would have been at least \$401,000.00. It does not deny that it was under a duty to return the Flood Building in the condition in which it was taken, reasonable wear and tear excepted. However, the Government argues that its taking created no right to just compensation. It contends that when the United States breached its duty, the appellant-

trustees were left without a remedy. The United States thus contends that there can be a taking for which the Fifth Amendment grants no right to just compensation. It argues that the Constitution grants rights for which there is no remedy upon breach. The Brief of the United States demonstrates that there is no precedent in the law of eminent domain for these contentions, which cannot be squared with the Supreme Court's admonition that the constitutional guaranty of the Fifth Amendment may not be "fictionalized" by substituting semantic niceties (for example, unenforceable rights) for "just compensation." *United States v. General Motors Corp.*, 323 U.S. 373, 381-382 (1945).

The United States in defense of its position makes three arguments. *First*, the Government urges that the law of lease contracts does not by analogy entitle a condemnee to complain of the Government's failure to return premises temporarily taken in the condition in which they were received, since the measure of damages applied in waste actions limits a lessor's recovery to the diminution in the market value of his property. What the measure of damages for waste or any other tort action has to do with the law of lease contracts, and more particularly the Government's liability for just compensation, is not suggested. Moreover, the Government fails to point out that even the law of waste through inclusive equitable relief protects a lessor from depredations of the sort perpetrated by the United States. *Secondly*, the United States argues that since just compensation is measured by the value inherent in the property taken, if the market value of the Flood Building was as great upon its return as it would have been had the building been in the condition received, there can be no liability for just compensation. No reason or authority is cited for regarding the Flood Building (or some fractional part thereof) as the "property taken." The Supreme Court

has made it clear that the "property taken" is not the building, but is the appellants' fixtures and permanent equipment carried off or destroyed by the United States. *Finally*, the Government states that it is not required to pay appellant-trustees "for a use which they had abandoned prior to the taking." This argument is addressed to the destruction of a strawman erected by the Government. As it knows perfectly well, no claim to compensation for a "use" is being made in the cases at bar.

Perhaps the most striking feature of the Government's Brief is its refusal to consider the practical consequences of the rule for which it contends. This rule that would allow the Government to confiscate the citizen's property and, without any liability, deny him an unquestioned right, the Government treats as the regrettable but inevitable result of cases in no way concerned with the question before the Court. The Government does not examine the operation of that rule since it cannot defend it.

Argument

I.

THE LAW OF LANDLORD AND TENANT DOES NOT PROVIDE ANY PRECEDENT FOR THE GOVERNMENT'S POSITION THAT IT COULD WITHOUT LIABILITY DISREGARD ITS OBLIGATION TO RESTORE NOR DOES IT SANCTION A DEPARTURE FROM THE EMINENT DOMAIN CASES WHICH HOLD THE GOVERNMENT'S LIABILITY FOR JUST COMPENSATION TO BE MEASURED BY ITS OBLIGATION.

The United States opens its argument with the admonition that, "While the contractual relationship of a landlord and tenant may be consulted in some of its aspects in determining the compensation owing for a temporary taking, the analogy to contract in an eminent domain matter must stop where it impinges upon settled principles of eminent domain law" (*Br.*, p. 10). From this premise the

Government turns directly to landlord-tenant decisions, without first considering any of the "settled principles of eminent domain law." In devoting more than half of its argument to landlord-tenant law, the Government does not discuss any of the landlord-tenant decisions cited in the Brief for Appellants (pp. 22-24). It does not discuss the principles which dictated the measure of damages employed in those cases. It does not suggest any respect in which the landlord-tenant decisions cited in the Brief for Appellants "impinge upon settled principles of eminent domain law." Thus, while the United States has entitled its argument "Appellants are not entitled to restoration costs by analogy to law governing lease contracts" (*Br.*, p. 10), what the Government, in fact, argues is that the law of landlord and tenant by analogy allows the United States to take property from Appellants without the payment of any compensation.

The United States argues that a tenant, in the absence of express covenant, impliedly covenants only against waste and where a tenant in breach of such implied covenant surrenders without restoration premises altered by him, the lessor may recover only the diminution in market value of the premises (*Br.*, pp. 13-14). On its assumption that such is the law, the Government implies that a condemnee is not damaged if his rights are similarly circumscribed.

There are, of course, two answers to the foregoing argument. It is irrelevant because, as the United States has put it, "the analogy to contract in an eminent domain matter must stop where it impinges upon settled principles of eminent domain law." It is untrue because the Government errs as to the law of landlord and tenant, which does not support the Government's position. Let us consider each of these infirmities in the Government's landlord-tenant argument.

The "settled principles of eminent domain law" which must limit any resort to landlord and tenant decisions have been discussed in the prior Brief for Appellants. Briefly they may be summarized as follows: (1.) A property owner's right in his fixtures and permanent equipment is *property* within the Fifth Amendment (*United States v. General Motors Corp.*, 323 U.S. 373, 383-384 (1945)); (2.) The destruction, damage or depreciation in value of such property by the United States constitutes a constitutional *taking* separate and distinct from a taking of use and occupancy (*United States v. General Motors Corp.*, *supra*; *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949)); (3.) While the United States in taking temporary use and occupancy of a building is granted the *right* to make alterations which would constitute enjoinable waste if undertaken by a tenant, in doing so the United States assumes the obligation to restore the premises to the condition in which they were received, reasonable wear and tear excepted (*United States v. 14.4756 Acres of Land*, 71 F. Supp. 1005 (D. Del. 1947); *United States v. 16.747 Acres of Land*, 50 F. Supp. 389 (D. Del. 1943); *In re Condemnation of Lands*, 250 Fed. 314 (D. Ark. 1918)); and (4.) When the United States fails to restore premises altered by it and thereby deprives the condemnee of his fixtures and permanent equipment, the just compensation payable by the United States for its taking is measured by the obligation which it breached. *Kimball Laundry Co. v. United States*, 339 U.S. 1, 7 (1949); *United States v. One Parcel of Land*, 131 F. Supp. 443, 446 (D. D.C. 1955); *United States v. 37.15 Acres of Land*, 77 F. Supp. 798 (N.D. Cal. 1948); *United States v. Certain Parcels of Land*, 55 F. Supp. 257, 264 (D. Md. 1944).

It is elementary in the law that compensation is given in lieu of and as redress for some infringed right. As the eminent domain cases cited by the United States point out,

it is given as "an equivalent" to the property taken (*Br.*, p. 21). If the duty breached by the United States had been merely a duty to return to appellants something as valuable as the property taken for temporary use, the measure of compensation adopted below might be deemed "an equivalent." However, the decided use and occupancy cases have uniformly held that such is not the duty assumed by the United States. The duty of the United States is to return the property taken for temporary use in the condition received, reasonable wear and tear excepted (R. 84). *See: United States v. 37.15 Acres of Land*, 77 F. Supp. 798, 802 (N.D. Cal. 1948). Obviously, the duties are not the same. They impose different obligations. *See e.g. Appleton v. Marx*, 191 N. Y. 81, 83 N. E. 563 (1908); *Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185, 44 Atl. 612 (1899); *Shafer Bros. Land Co. v. Universal Pictures Corp.*, 188 Wash. 33, 61 P.2d 593 (1936). What the Government really argues on the basis of what it claims to be the law of landlord and tenant is that the Court may ignore the distinction in the foregoing duties and by indirection reconstitute the duty to return premises in the condition received as a duty not to diminish the market value of premises taken for use. This, however, flies squarely into the Government's admission that "the analogy to contract in an eminent domain matter must stop where it impinges upon settled principles of eminent domain law."

Were the Government's landlord and tenant argument not foreclosed by "settled principles of eminent domain law," it would nevertheless be wholly untenable. The law of landlord and tenant does not allow a tenant to force upon his landlord premises radically altered without the latter's consent, depriving the landlord of any remedy for the tenant's depredations. The United States is wrong when it states that a tenant impliedly covenants only against waste

(*Br.*, p. 13). Indeed, the cases that it cites show that such is not the law. *See e.g. Riverview Properties, Inc. v. United States*, 102 F. Supp. 934 (1952). Absent some disclaimer, a lessee impliedly covenants *to return* the premises at the conclusion of his term in the condition in which they were received, reasonable wear and tear excepted. *United States v. Jordan*, 186 F.2d 803, 806 (6th Cir. 1951); *Patton v. United States*, 139 F. Supp. 279, 283 (W.D. Pa. 1955); *Salina Coca-Cola Bottling Corp. v. Rogers*, 171 Kan. 688, 237 P.2d 218 (1951); *Lane v. Spurgeon*, 100 Cal. App. 2d 460, 223 P.2d 889 (1950). *See*: 51 C. J. S. 1156-1157 (1947). Such an obligation is not the same as waste or an implied covenant against waste.¹ *See: Goodyear Fabric Corp. v. Hirss*, 169 F.2d 115 (1st Cir. 1948). *Cf. Griffin Grocery Co. v. McBride*, 217 Ark. 949, 235 S.W. 2d 38 (1950); *Ryan v. Boston Housing Authority*, 322 Mass. 299, 77 N.E. 2d 399 (1948). The cases cited by the Government show that a liability for waste is not the same as a liability for breach of an implied covenant, the former being *ex delicto* and the latter *ex contractu*. *See e.g. Winans v. Valentine*, 152 Ore. 462, 54 P.2d 106 (1936). The Government asserts that the measure of damages for waste is the diminution in market value caused by the injury. However, the law of waste does not permit a tenant to alter or strip premises

1. Waste is defined to be "a spoil or destruction in houses, gardens, trees or other corporeal hereditaments, to the disinherison of him that hath the remainder or reversion." 2 *Bl. Com.* 281. It is waste to alter buildings or vary in any manner permanent erections. 6 *Wait, Act. & Def.* 239. Taylor, *Landlord & Tenant*, § 348; Woods, *Landlord and Tenant*, § 420. It is of the nature of waste that it shall have been committed without legal right and that there shall be a privity of estate between the wrongdoer and the reversioner. *Southern Pacific Land Co. v. Kiggins*, 110 Cal. App. 56, 293 Pac. 708 (1930). Since the United States is granted the legal right to alter premises temporarily taken by it, subject to its duty to restore them to the condition in which they were received, its alteration of the Flood Building could not constitute waste. *See: United States v. 14,4756 Acres of Land*, 71 F. Supp. 1005 (D. Del. 1947).

as he sees fit so long as the market value of the premises is not decreased. A tenant cannot without his landlord's consent make alterations to a building. Such alterations constitute waste and may be enjoined even if they would increase the value of his property. *See e.g. F. W. Woolworth Co. v. Nelson*, 204 Ala. 172, 85 So. 449 (1920). *See*: 4 Thompson, *Real Property*, 129-131 (1940 ed.); *Note*, 9 A.L.R. 445 (1920). Thus, even the law of waste precludes a tenant from forcing unwanted alterations on his landlord despite their value.

That the Government's position divorces "just compensation" from the "taking" for which it is given is well illustrated by the quotation at page 14 of its Brief from 3 Sedgwick, *Damages* (9th ed., 1920), pp. 1918-1920, sec. 932. The Government quotes from Sedgwick as though it were quoting some rule relevant to the law of landlord and tenant. In fact, the rule quoted is that applicable in *trespass* actions brought for *injuries to land*! At the same time the United States fails to quote the measure of damages for breach of a tenant's covenant, stated in that work:

"But where the tenant *at the end of the term* leaves the premises out of repair, the measure of damages is the cost of putting them into repair, and not the depreciation in value of the property. Consequently the measure of damages is not changed by the fact that the premises are as valuable without the repairs as with them, nor that the lessor has contracted with a third party to have the buildings removed at the end of the term." 3 Sedgwick, *Damages* 2083 (9th ed. 1920).

This rule which measures a tenant's liability by his obligation is not only supported by the great weight of landlord-tenant authority but comports to settled eminent domain principle by measuring the compensation payable by the right for which it is granted. It avoids the absurdity

of allowing an obligor to challenge one's right to the performance which he has contracted to furnish. *See e.g. Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185, 44 Atl. 612 (1899). A general contractor who had contracted and been paid to restore the Flood Building to the condition in which it was on February 1, 1951, could not justify a wilful breach of his engagement on the grounds that appellants were not damaged by his default. *Cf. All-American Oil & Gas Co. v. Connellee*, 3 F.2d 107 (5th Cir. 1924); *Richmond Wharf & Dock Co. v. Blake*, 39 Cal. App. 1, 177 Pac. 508 (1919); *Dunne Inv. Co. v. Empire State Surety Co.*, 27 Cal. App. 208, 150 Pac. 405 (1915). The United States, in assuming the same duty, should be in no different position. The cases which the Government cites do not collectively abolish the distinction between a duty not to trespass and a duty to restore. Nor do those cases abolish the distinction between damages recoverable for trespass and those recoverable for breach of a covenant to restore. Indeed the cases cited by the Government do not represent a consistent body of unified precedent. The cases are drawn from a wide variety of fields and embody a diversity of rules. While the Government declares that they are "to the same effect" (*Br.*, p. 19), even a cursory reading of those cases disabuses any such idea. No purpose could possibly be served by discussing them individually. Suffice it to say those cases do not support the Government's position.² Thus, in *Realty Associates, Inc. v. United States*, 138

2. *Murray v. Patterson*, 18 Tenn. App. 30, 72 S.W. 2d 559 (1934), *Hickman v. Wellauer*, 169 Wis. 18, 171 N.W. 635 (1919), *Zindell v. Central Mutual Ins. Co.*, 222 Wis. 575, 269 N.W. 327 (1936), and *Erceg v. Fairbanks Exploration Co.*, 95 F.2d 850 (9th Cir. 1938), cited at page 19 of the Government's Brief, are all tort cases, in which damages were measured by the duty from which liability arose. *Eastern Steamship Lines, Inc. v. United States*, 112 F. Supp. 167 (Ct. Cl. 1953), *Gardner v. Darling Stores Corp.*, 242 F.2d 3 (2nd Cir. 1957), and *Georgia Kaolin Co. v. United States*,

F. Supp. 875, 876 (Ct. Cl. 1956), and *Crystal Concrete Corp. v. Town of Braintree*, 309 Mass. 463, 35 N.E. 2d 672, 675 (1945), it is made clear that the rule is not what the Government states it to be. In the words of the former decision, "Generally speaking the cost of restoring is the measure of damages, taking into consideration the age of the installations and ordinary wear and tear." In both cases exceptions are made to that rule only on the basis of *unique* circumstances which the Government does not suggest to be present here. In apparent recognition that damages in an amount less than the cost of restoration is an *inadequate* remedy, both explicitly announce that they are not passing upon the lessor's rights in equity.³

214 F.2d 284 (5th Cir. 1954), cited at pages 16 and 19, turned on specific contract provisions defining liability. *Fuselier v. United States*, 111 F. Supp. 471 (W.D. La. 1953), and *Carr v. United States*, 28 F. Supp. 236 (W.D. Ky. 1934), cited at pages 17 and 20, respectively, turn on the construction of statutes. *Henry H. Cross Co. v. Rice*, 45 F.2d 940 (7th Cir. 1931), cited on page 19, measures the *depreciation* of equipment by its diminution in value. Neither *Zoslow v. National Savings & Trust Co.*, 201 F.2d 208 (App. D.C. 1952), nor *In re Jewell*, 13 Fed. Cas. No. 7302 (S.D. N.Y. 1879), consider the measure of damages. In none of the cases which the Government cites was a lessee permitted without liability to appropriate and destroy valuable fixtures and equipment of the lessor's. None conceivably sanctions depredations of the sort practiced by the United States.

3. Thus, the Court of Claims in the *Realty Associates* case states explicitly (138 F. Supp. at 877):

"If this were a suit for specific performance, the plaintiff might well compel the defendant to actually restore the property to the status and condition which prevailed in May 1943, upon the performance of which the property would again become practically useless. I am sure the plaintiff would not have thought of instituting such a suit because it is inconceivable that it would have wanted the property restored to its previous condition which had produced years of idleness. In the light of the entire record it is difficult to believe that plaintiff in good faith wanted any of the items restored."

Cf. *Crystal Concrete Corp. v. Town of Braintree*, 309 Mass. 463, 35 N.E. 2d 672, 675 (1945).

Apart from the complete inconsistency of the Government's position with "settled principles of eminent domain law," it is evident that a condemnee cannot pick and choose between equity and law for relief. A condemnee when his property is taken can only claim just compensation (a fact which the United States made clear when the appellant-trustees late in these cases expressed their willingness to accept specific performance). Accordingly, a landlord-tenant case which compels a lessor to enforce his rights in equity and curtails his rights at law cannot be even analogical authority for limiting a condemnee's right to just compensation. However, even in the realm of landlord and tenant the United States cites no case in which a tenant has been able to confiscate his landlord's fixtures and equipment without liability. It cites no case parallel to the case at bar. The "federal rule" that it suggests (*Br.*, p. 20) is contradicted by cases it cites. See *e.g. Realty Associates, Inc. v. United States*, 138 F. Supp. 875, 876 (Ct. Cl. 1956). It equally errs in stating the law of California. See: *Sprague v. Fauver*, 71 Cal. App. 2d 333, 162 P.2d 865 (1945); *Coughlin v. Blair*, 41 Cal. 2d 587, 600, 262 P.2d 305 (1953). *Cf. Green v. General Petroleum Corp.*, 205 Cal. 328, 270 Pac. 952 (1928). In short, the Government's argument fails both because it is unable to find authority in the law of landlord and tenant for its position and because, as it has conceded, "the analogy to contract in an eminent domain matter must stop where it impinges upon settled principles of eminent domain law."

II.

THE LAW OF EMINENT DOMAIN PROVIDES NO BASIS FOR THE GOVERNMENT'S POSITION THAT IT COULD APPROPRIATE AND DESTROY WITHOUT LIABILITY THE PROPERTY OF THE APPELLANT-TRUSTEES.

In turning finally to a consideration of eminent domain principles, the United States in its Brief makes three argu-

ments. The first contention made is that just compensation is measured by the "value inherent in the property" taken, and hence, if the market value of the Flood Building on its return was as great as it would have been had the property removed from the building been restored, no compensation is payable (*Br.*, p. 21-23). In making this argument the United States has assumed without discussion or the citation of authority that the property taken was some fractional part of the Flood Building. As pointed out in the Brief for Appellants, the Government's assumption is inadmissible. Thus, in *United States v. General Motors Corp.*, 323 U.S. 373, 383-384 (1945), the Supreme Court held that:

"For fixtures and permanent equipment destroyed or depreciated in value by the taking, the respondent is entitled to compensation. An owner's right in these are no less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon erected. And it matters not whether they were taken over by the Government or destroyed, since, as has been said, destruction is tantamount to taking. * * * And since they are property distinct from the right of occupancy such compensation should be awarded not as a part of but in addition to the value of occupancy as such."

Thus, when the United States appropriates equipment and fixtures in the course of a temporary taking, its liability for just compensation in the absence of restoration is in no sense contingent upon the market value of the premises occupied upon their return. If the Government's liability could be discharged, as it argues, by the return of a radically altered Flood Building with a market value equal to that which it was obligated to return, it could just as logically have been discharged by the delivery of a building of equal value in Muncie, Indiana, or a factory of equal value in Trenton, New Jersey. The Government's argument that

"The question is whether, in the entire transaction, the landowners have been pecuniarily damaged" (*Br.*, p. 28) could be equally well invoked had such a course been pursued.

The use and occupancy cases cited by the Government do not in any way support its position (*Br.*, p. 24). *See: United States v. Jordan*, 186 F.2d 803 (6th Cir. 1951); *United States v. 37.15 Acres of Land*, 77 F. Supp. 798 (N.D. Cal. 1948); *United States v. 60,000 Square Feet of Land*, 53 F. Supp. 767 (N.D. Cal. 1943); *United States v. 5,901.77 Acres of Land*, 65 F. Supp. 454 (N.D. Cal. 1946).⁴ Indeed, we invite and urge this Court to read those cases and observe the rule that they enunciate as to the liability of the United States upon breach of its unquestioned duty to return premises temporarily taken in the condition received, reasonable wear and tear excepted. It is obviously beyond the realm of argument whether *United States v. 37.15 Acres of Land*, 77 F. Supp. 798 (N.D. Cal. 1948), for example, supports appellants' or appellee's position. The fact follows the clear and unambiguous language of the Court:

"It is not, and clearly could not be, disputed that the United States was obligated to return the hotel together with its equipment and furnishings, to the owner

4. *United States v. Jordan*, 186 F.2d 803 (6th Cir. 1951), involved a temporary taking of land for use as a gunnery range, in which timber was left with bullets lodged in it and was rendered useless. While standing timber is obviously not the same as a building's fixtures and equipment, it was held that, "Such damage to or destruction of the standing timber imposed an obligation upon the Government under the Fifth Amendment to the Constitution of the United States to make payment to the lessor *for the value thereof*, in addition to its obligation for the rental value of the property so leased. *United States v. General Motors Corp.*, 323 U.S. 373, 383-384, 65 S.Ct. 357, 89 L.Ed. 311; *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7, 69 S.Ct. 1434, 93 L.Ed. 1765." (Emphasis ours.) There is no suggestion that the right to compensation is limited to or contingent upon diminution in the market value of the fee. The remaining cases cited by the Government as supporting its position have been discussed in the note at pages 29 and 30 of the Brief for Appellants.

upon the termination of the term, in as good a condition as when received, reasonable wear and tear thereof excepted. * * * However, the government elected not to restore the premises, repair the damage caused to real and personal property lost or destroyed, but left that to be done by the owners. Therefore it would follow that the United States is liable for the reasonable cost of restoring the premises and personal property and also for the reasonable value of the use of the premises during the period of time required to accomplish such restoration." 77 F. Supp. at 802-803.

The Government argues that the decided use and occupancy cases do not mean what they say in referring to "restoration" and the "cost of restoration" (*Br.*, pp. 24-27). It asks this Court to read restrictions, conditions and limitations into the cases cited in the Brief for Appellants which were not expressed by the courts which decided those cases. Whether those courts meant what they said is not a matter which can be argued. We urge this Court to read those decisions and submit that while the Government may deny that they mean what they say, it can show no rational basis for its contention.

The second argument made by the United States in the context of eminent domain is that to measure the Government's liability for just compensation by what it was obligated to do, but refused to do, reimburses the appellant-trustees "for the particular values which they attach to the building" and involves a departure from a standard of "external validity" (*Br.*, p. 12). For this contention neither authority nor reason is advanced. Obviously, the courts invoking the measure have not found any such infirmity, but to the contrary have deemed it "the very amount that the government would have been required to pay in any event" had it discharged its duty and avoided the taking. *See e.g. United States v. 37.15 Acres of Land*, 77 F. Supp. 798, 803

(N.D. Cal. 1948). Certainly the concepts of "reasonable cost" and "market rental value" are no less objective than "market value."

The third and final eminent domain argument which the United States makes is that it cannot be required to pay for a use abandoned prior to taking (*Br.*, pp. 28-29). No one is claiming that it should pay for *use*. A condemnee being denied any right to consequential damages, it is wholly irrelevant what use or uses were made of premises prior to a temporary taking. However, this elementary principle only points up and emphasizes the untenability of the Government's argument that there is no pecuniary deprivation when the Government, although breaching its duty, returns a building having a market value equal to that taken for use. The United States takes temporary use of an electronics plant which it returns as a missile plant of equal market value. The owner of the electronics plant cannot secure consequential damages occasioned by the return of a plant which he is not equipped to operate. If he desires to sell the missile plant to obtain the dollars necessary to buy an electronics plant of the type which the Government took and was obligated to return, the Government does not pay for profits lost by an idle plant, the cost of holding the plant until a buyer can be found, or, indeed, the cost of securing that buyer. Indeed, by the time the case is decided the market value determined may be only a fact of historical interest. Thus, the point that the Government makes as to consequential damages shows that the measure of just compensation for which it contends, aside from precedent, is wholly unreasonable. In permitting the United States to profit from default, the rule exposes the landowner not only to denial of his right but to extensive financial losses which being consequential in nature would give rise to no right to compensation.

III.

THE GOVERNMENT IN ITS BRIEF HAS NOT CONSIDERED THE PRACTICAL CONSEQUENCES OF THE RULE FOR WHICH IT CONTENDS BECAUSE IT CANNOT DEFEND THE OPERATION OF SUCH A RULE.

Although the case at bar involves basic and far-reaching questions as to a citizen's constitutional rights when his property is taken by the United States for temporary use, the United States in its Brief does not discuss anywhere the consequences of the rule urged by it and adopted below. Unquestionably this failure results from the belief that the rule when treated as other than a logical deduction, cannot be defended. We submit that the idea that the Government can appropriate and destroy hundreds of thousands of dollars' worth of property, and then breach without liability its unquestioned duty to replace and restore that property, is not an attractive idea.

In our society a landowner enjoys the right to use his property in any lawful way that he sees fit. The rights attaching to property are not repealed when a landowner's use of his property is not what Government witnesses deem the highest and best use. The fact that many buildings in this area are being converted to parking lots does not mean that a landowner's rights in buildings which could profitably be so converted are no longer protected. When the Government took temporary use and occupancy of the Flood Building it purported to take no more and paid for no more. Its respective Complaints claimed no right of spoliation, no right to strip the building of everything not decreasing its market value. It paid for the use of the premises a compensation fixed on the basis of the reasonable rental value of the property, a sum fixed with reference to a hypothetical lessee who could be enjoined from committing waste and who impliedly would covenant to return the premises in

the condition received, reasonable wear and tear excepted. Common sense dictates that such rent is quite different than that which would prevail were the tenant able to strip the demised premises at his pleasure without liability. However, the Government does not claim any right to strip premises temporarily taken. To the contrary, it admits that it was under a duty to return the premises in the condition in which they were received, reasonable wear and tear excepted, but it claims that it can limit liability to the diminution in market value of the premises used, and hence, so long as a jury will believe its chosen experts that the fee has not diminished in market value, its duty may be ignored without liability.

The rule urged by the Government leaves those deprived of their right helpless to secure its enforcement, but look to its consequence on the Government. As pointed out in our prior brief, the rule urged rewards the Government for its default. It makes default considerably more profitable than obedience to the Government's unquestioned duty. Not only does it save the cost of restoration but it permits the Government to help itself to hundreds of thousands of dollars' worth of valuable property for nothing. This the Government has not and cannot deny. We submit that such a rule would fly into the face of common sense. Happily, however, examination of the relevant authorities makes it abundantly clear that such is not the law.

Conclusion

The appellant-trustees having been denied the just compensation guaranteed under the Fifth Amendment, the judgment of the District Court must be reversed, with direction that they recover the reasonable cost of restoring the premises to the condition in which they were taken on February 1, 1951, and the reasonable rental value of the premises for the period reasonably required to effect that restoration.

Respectfully submitted,

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United States
Court of Appeals
for the Ninth Circuit

**TRI-STATE MUTUAL GRAIN DEALERS FIRE
INSURANCE COMPANY,**

Appellant,

vs.

**C. R. MORRIS, CONSTANCE B. HONAKER,
THE HOME INSURANCE COMPANY and
THE CANADIAN FIRE INSURANCE COM-
PANY,**

Appellees.

C. R. MORRIS and CONSTANCE B. HONAKER,

Appellants,

vs.

**THE HOME INSURANCE COMPANY and THE
CANADIAN FIRE INSURANCE COM-
PANY,**

Appellees.

Transcript of Record

**Appeals from the United States District Court for the
Southern District of California
Southern Division.**

FILED

No. 16226

United States
Court of Appeals
for the Ninth Circuit

TRI-STATE MUTUAL GRAIN DEALERS FIRE
INSURANCE COMPANY,

Appellant,

vs.

C. R. MORRIS, CONSTANCE B. HONAKER,
THE HOME INSURANCE COMPANY and
THE CANADIAN FIRE INSURANCE COM-
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States, Southern
District of California, Central Division

No. 1978-SD-C

C. R. MORRIS and CONSTANCE B. HONAKER,

Plaintiffs,

vs.

TRI-STATE MUTUAL GRAIN DEALERS FIRE
INSURANCE COMPANY, a Corporation;
THE HOME INSURANCE COMPANY, a
Stock Company; THE CANADIAN FIRE IN-
SURANCE COMPANY, a Stock Company,

Defendants.

PETITION FOR REMOVAL FROM STATE
COURT UNDER TITLE 28, SECTION 1441
(b) and SECTION 1446, UNITED STATES
JUDICIAL CODE, TO THE UNITED
STATES DISTRICT COURT IN AND FOR
THE SOUTHERN DISTRICT OF CALI-
FORNIA, CENTRAL DIVISION

Comes Now the defendant The Canadian Fire
Insurance Company, and for cause of removal al-
leges as follows:

I.

That Petitioner The Canadian Fire Insurance
Company, is a resident and citizen of Winnipeg,
Canada; the defendant Tri-State Mutual Grain
Dealers Fire Insurance Company is a resident and

citizen of the State of Minnestota; the defendant The Home Insurance Company is a resident and citizen of the State of New York.

II.

That plaintiffs are citizens and residents of the State of California. [2*]

III.

That summons and complaint in said action has been served upon your petitioner The Canadian Fire Insurance Company on or about November 2, 1956. That said action in the Superior Court of the State of California in and for the County of San Diego is one for the recovery of money allegedly due under policy of fire insurance, and that the sum which plaintiffs are seeking to recover from your petitioner is a sum in excess of \$3,000.00, exclusive of interest and costs of suit, to wit, the sum of \$8,341.49.

IV.

That attached hereto and made a part of this petition is copy of the complaint and summons served upon your petitioner, and that no other papers have been served upon your petitioner and that the time to answer or appear in the above-entitled action has not expired and that 20 days have not elapsed since service of summons and complaint upon your petitioner, and that this peti-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

tion will be filed within 20 days after the time of service of the complaint and summons upon your petitioner.

Wherefore, your petitioner prays:

1. That the above-entitled court make and enter its order directing the Clerk of the Superior Court of the State of California in and for the County of San Diego to take no further proceedings in said action now pending in said Superior Court of the State of California in and for the County of San Diego.

2. That this Court make and enter its order directing the removal of said action to the United States District Court in and for the Southern District of California, Central Division.

/s/ THOMAS P. MENZIES,
Attorney for Defendant and Petitioner The Canadian Fire Insurance Company. [3]

In the Superior Court of the State of California
in and for the County of San Diego

No. 2092971

C. R. MORRIS and CONSTANCE B. HONAKER,
Plaintiffs,

vs.

TRI-STATE MUTUAL GRAIN DEALERS FIRE
INSURANCE COMPANY, a Corporation;
THE HOME INSURANCE COMPANY, a
Stock Company; THE CANADIAN FIRE IN-
SURANCE COMPANY, a Stock Company,
Defendants.

COMPLAINT

Plaintiffs for Cause of Action Against Defendants, Allege as Follows:

I.

That defendants and each of them, are corporations doing business in the County of San Diego, State of California.

II.

That plaintiff C. R. Morris, at all times herein mentioned, was, and now is, the owner of the beneficial interest under a deed of trust encumbering that certain parcel of real property located in the County of San Diego, State of California, described as follows:

“The North 140 feet of the East 150 feet of
Lot 117 of Riverview Farms, according to Map

thereof No. 1683, filed in the office of the County Recorder of said County February 25, [4] 1916.”

That the unpaid indebtedness due plaintiff, C. R. Morris, under said deed of trust, at all times herein mentioned, was, and now is, the sum of \$5879.28, together with interest thereon at the rate of 6% per annum from January 1, 1956.

III.

Plaintiff Constance B. Honaker, at all times herein mentioned, was, and now is, the owner of the beneficial interest of a deed of trust encumbering that certain improved parcel of real property described in Paragraph II above.

That said deed of trust in favor of plaintiff Constance B. Honaker, is subsequent to, and subordinate to the aforementioned deed of trust in favor of plaintiff C. R. Morris.

That the unpaid indebtedness due plaintiff Constance B. Honaker, under said deed of trust, was at all times herein mentioned, and now is, the sum of \$2462.21, together with interest thereon at the rate of 6% per annum from June 1, 1956.

IV.

That on the 27th day of September, 1955, a building located and situate upon said real property was destroyed and damaged by fire, the exact amount and extent of said damage being unknown to plaintiffs, save and except that plaintiffs are informed

and believe, and upon such information and belief allege, that said loss and damage by fire to said building was in excess of the total sums due plaintiffs collectively under their aforementioned respective deeds of trust.

V.

That on the 27th day of September, 1955, at the time of the aforementioned destruction and damage to said building by fire, defendant, Tri-Mutual Grain Dealers Fire Insurance Company, was the insurer under its policy No. 4-16532, insuring Aubrey L. Owens and Emo T. Owens against loss of said building by fire; that under and by virtue of the terms, conditions [5] and provisions of a mortgage clause attached to said policy of insurance, and forming a part thereof, plaintiffs, C. R. Morris and Constance B. Honaker were respectively designated and named as being entitled to the loss payable under said policy to the extent of their respective interests under their aforementioned deeds of trust.

VI.

That at the time of the aforementioned destruction and damage to said building by fire, to wit, on the 27th day of September, 1955, defendant, The Home Insurance Company, was the insurer under its policy No. 7502, insuring Rose Winnick Gilmore, dba as "The Corral," against loss of said building by fire; that under and by virtue of the terms, conditions and provisions of a mortgagee clause attached to said policy of insurance, and forming a part thereof, plaintiffs, C. R. Morris and Constance

B. Honaker were respectively designated and named as being entitled to the loss payable under said policy to the extent of their respective interests under their aforementioned deeds of trust.

VII.

That on the 27th day of September, 1955, at the time of the aforementioned destruction and damage to said building by fire, defendant, The Canadian Fire Insurance Company, was the insurer under its policy No. MF 104777, insuring Rose Winnick Gilmore, dba "The Corral," against loss of said building by fire; that under and by virtue of the terms, conditions and provisions of a mortgage clause attached to said policy of insurance, and forming a part thereof, plaintiffs C. R. Morris and Constance B. Honaker were respectively designated and named as being entitled to the loss payable under said policy to the extent of their respective interests under their aforementioned deeds of [6] trust.

VIII.

That on the 27th day of September, 1955, at the time of the aforementioned destruction and damage to said building by fire, the above-mentioned policies of fire insurance, and each of them, issued by the respective defendants, were in full force and effect as to the rights and interest of plaintiffs thereunder.

IX.

That all of the terms, conditions and obligations of said policies of fire insurance, and each of them.

on the part of plaintiffs to be performed, have been fully performed and complied with by said plaintiffs and each of them.

X.

That by written request, plaintiffs and each of them, have requested of defendants, and each of them, to adjust and settle under said policies of insurance, the loss payable to plaintiffs by reason of the aforementioned destruction and damage to said building by fire; that although said request has been made, defendants, and each of them, have failed and refused to pay plaintiffs or either of them, the sums due plaintiffs, or any part thereof under said policies of insurance; that there is now due, owing and unpaid to the plaintiff C. R. Morris from defendants, the sum of \$5879.28, together with interest thereon at the rate of 6% per annum from January 1, 1956; that there is now due, owing and unpaid to plaintiff Constance B. Honaker, from defendants, the sum of \$2462.21, together with interest thereon at the rate of 6% per annum from June 1, 1956.

Wherefore, plaintiff prays judgment against the defendants and each of them:

1. That plaintiff C. R. Morris have judgment in the sum of \$5879.28, together with interest thereon at the rate of 6% per annum from January 1, 1956; [7]

2. That plaintiff Constance B. Honaker have judgment in the sum of \$2462.21, together with in-

terest thereon at the rate of 6% per annum from June 1, 1956;

3. That plaintiffs be awarded their costs of suit herein, together with such other and further relief as the Court deems just.

YALE, WILSON,
SUMMERS & YALE,

By /s/ WILLIAM A. YALE,
Attorneys for Plaintiffs.

Duly Verified.

[Endorsed]: Filed November 23, 1956. [8]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT THE CANADIAN
FIRE INSURANCE COMPANY

Comes Now the Defendant, The Canadian Fire Insurance Company, a stock company, and answering plaintiffs' complaint on file herein for itself alone and not for its co-defendants or any of them admits, denies, and alleges as follows:

I.

Admits the allegations contained in Paragraph I.

II.

Defendant here answering does not have sufficient knowledge, information, or belief either to admit or

deny the allegations contained in Paragraph II; and, basing this answer on that ground, denies said allegations and each of them, both generally and specifically, and on that ground specifically denies that said plaintiffs own a [11] beneficial interest in the property therein mentioned in the sum of \$5,879.28 or in any other sum or amount whatsoever or at all.

III.

Defendant here answering does not have sufficient knowledge, information, or belief either to admit or deny the allegations contained in Paragraph III; and, basing this answer on that ground, denies said allegations and each of them, both generally and specifically, and on that ground specifically denies that said plaintiff Constance B. Honaker owns a beneficial interest in the property therein mentioned in the sum of \$2,462.21 or in any other sum or amount whatsoever or at all.

IV.

Answering Paragraph IV, admits that a fire occurred on a building situated upon the real property therein mentioned. Defendant here answering does not have sufficient knowledge, information, or belief either to admit or deny plaintiffs' allegations respecting the amount of said damage to said building; and, basing this answer on that ground, denies that said building was damaged in the amount set forth in plaintiffs' complaint or in any other amount whatsoever or at all.

V.

Admits the allegations contained in Paragraph V.

VI.

Denies generally and specifically each and every, all and singular, the allegations contained in Paragraphs VI and VII.

Defendant alleges that it did prepare a policy of insurance wherein plaintiffs were designated as loss payees, and alleges on information and belief that the Home Insurance Company did prepare a similar policy. Defendant, however, alleges that said policies of insurance of this answering defendant and of the Home Insurance Company were not in force or effect at the time of the alleged loss; that said policies of insurance had never been delivered; that [12] Rose Winnick Gilmore, who was named as the insured under said policies of insurance, did not have an insurable interest in said property; that title to said property never passed to the named insured of said policies of insurance, to wit, Rose Winnick Gilmore; and therefore title had not passed to plaintiffs at the time of the alleged loss.

VII.

Denies generally and specifically each and every, all and singular, the allegations contained in Paragraph VIII, except that defendant admits that the policy of insurance of defendant Tri-State Mutual Grain Dealers Fire Insurance Company was in full force and effect at the times mentioned in plaintiffs' complaint.

VIII.

Denies generally and specifically each and every, all and singular, the allegations contained in Paragraph IX insofar as this answering defendant is concerned. This answering defendant does not have sufficient knowledge, information, or belief either to admit or deny plaintiffs' allegations that the terms or conditions or obligations under the policies of fire insurance allegedly issued by its co-defendants had been performed or complied with.

IX.

Denies generally and specifically each and every, all and singular, the allegations contained in Paragraph X; and, except as herein specifically admitted, denies that there is now due, owing, or unpaid to plaintiff C. R. Morris from this answering defendant the sum of \$5,879.28 or any other sum or amount whatsoever or at all; and specifically denies that there is now due, owing, or unpaid to plaintiff Constance B. Honaker from this answering defendant the sum of \$2,462.21 or any other sum or amount whatsoever or at all.

Specifically denies that there was any loss payable to plaintiffs or either of them by this answering defendant by reason of any destruction or damage to the building mentioned in plaintiffs' [13] complaint. Admits that this answering defendant has refused to pay plaintiffs or either of them.

Further Answering Plaintiffs' Complaint and for a
First, Separate Defense Thereto, Defendant
Alleges:

I.

That the policy of insurance of this answering
defendant was never delivered to plaintiffs or either
of them or to the person named as the insured in
said policy, to wit, Rose Winnick Gilmore, or to
any agent of said plaintiffs or either of them or to
any agent of said Rose Winnick Gilmore.

Further Answering Plaintiffs' Complaint and for a
Second Separate Defense Thereto, Defendant
Alleges:

I.

The policy of insurance herein sued upon pro-
vides that the named insured therein is Rose Win-
nick Gilmore.

Said policy of insurance further provides in part
as follows: "Loss, if any, shall be adjusted with the
insured specifically named, unless otherwise speci-
fied by (a) written agreement or (b) endorsement
hereon."

That said policy of insurance does not specify
any person other than the specifically named in-
sured, to wit, Rose Winnick Gilmore, with whom
any loss shall be adjusted.

Further Answering Plaintiffs' Complaints and for
a Third Separate and Affirmative Defense
Thereto, Defendant Alleges:

I.

This answering defendant is informed and believes and on that ground alleges that at the time of the alleged loss set forth in plaintiffs' complaint, the ownership of said property had not passed to Rose Winnick Gilmore, who is named as the insured in the [14] policy of insurance sued upon by plaintiffs; and that, therefore, plaintiffs or either of them did not have any title to said property under Rose Winnick Gilmore.

II.

Plaintiffs are informed and believe and therefore allege that at the time of the alleged loss plaintiffs' interest, if any, in said property was insured under a policy of insurance issued to the then owner thereof by defendant Tri-State Mutual Grain Dealers Fire Insurance Company, and that their loss, if any, is covered under said policy of insurance and not under any policy of insurance of this answering defendant.

Further Answering Plaintiffs' Complaint and for
a Fourth, Separate and Affirmative Defense
Thereto, Defendant Alleges:

I.

The policy of insurance herein sued upon provides in part as follows:

“Requirements in Case Loss Occurs. The insured shall give written notice to this company of any loss without unnecessary delay, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; and within 60 days after the loss, unless such time is extended in writing by this company, the insured shall render to this company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, * * *”

And said policy further provides in part: [15]

“When Loss Payable. The amount of loss for which this company may be liable shall be payable 60 days after proof of loss, as herein provided, is received by this company and ascertainment of the loss is made either by agreement between the insured and this company expressed in writing or by the filing with this company of an award as herein provided.”

II.

That no proof of loss was rendered to defendant within sixty days after the alleged loss or any time by the plaintiffs or either of them or by Rose Win-

nick Gilmore, which proof of loss is a condition precedent to recovery under said policy.

III.

Plaintiffs' action is prematurely brought in that no proof of loss has been submitted to defendant, nor has ascertainment of the loss been made either by agreement or by the filing of an award as set forth in said policy of insurance.

Further Answering Plaintiffs' Complaint and for a Fifth, Separate and Affirmative Defense Thereto, Defendant Alleges:

I.

The policy of insurance herein sued upon provides in part as follows:

"Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss."

II.

The alleged date of the loss as set forth in plaintiffs' complaint was the 27th day of September, 1955. The instant action was filed on September 27, 1956, and thus said action was not commenced within twelve months next after the inception of the loss, if any. [16]

Wherefore, defendant prays that plaintiffs take nothing by reason of their complaint and that de-

fendant be hence dismissed with its costs of suit herein incurred and for such other and further relief as to the court may seem just.

/s/ THOMAS P. MENZIES,

Attorney for Defendant

Affidavit of service my mail attached.

[Endorsed]: Filed November 27, 1956. [17]

[Title of District Court and Cause.]

ANSWER

Comes Now Defendant Tri-State Mutual Grain Dealers Fire Insurance Company, a corporation, and for answer to Plaintiffs' Complaint alleges:

I.

As to the allegations of Sub-paragraph 2 of Paragraph II of said Complaint, states that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in said Sub-paragraph.

II.

As to the allegations of Sub-paragraph 3 of Paragraph III of said Complaint, states that it is without knowledge or information sufficient to form a belief as to the truth of the averments of said Sub-paragraph. [19]

III.

As to the allegations of Paragraph IV of said Complaint, denies that said loss and damage by fire

to said building was in excess of the total sums due Plaintiffs collectively under their respective deeds of trust and denies that the loss and damage was in any other or greater sum than the sum of \$7,428.96

IV.

As to the allegations of Paragraph V of said Complaint, denies the same.

V.

As to the allegations of Paragraph VIII of said Complaint, denies said allegations.

VI.

As to the allegations of Paragraph IX of said Complaint, denies said allegations.

VII.

As to the allegations of Paragraph X of said Complaint, denies that there is now or was at the time of the commencement of the foregoing entitled action, or at any other time at all, due, owing or unpaid to Plaintiff C. R. Morris the sum of \$5,879.28, or any other sum at all, or due, owing or unpaid to Plaintiff Constance B. Honaker from Defendant the sum of \$2,462.21, or any other sum at all.

Further Pleading and as a Further and Separate Defense to Plaintiffs' Complaint, This Defendant Alleges:

I.

That on or about June 25th, 1955, this Defendant executed and delivered to Aubrey L. Owens and

Emma T. Owens, his wife, its policy of insurance, insuring in an amount not exceeding \$7,000.00, a certain building situate Woodside Avenue on west side of Cajon Avenue, 7/10 of a mile south of Lakeside, California, and provided [20] therein that loss, if any, under said policy to be payable to Plaintiffs herein as their respective interests appear.

II.

That on or about September 1st, 1955, for a valuable consideration, said Aubrey L. Owens and Emma T. Owens sold and transferred and delivered possession to Jack W. Gilmore and Rose Winnick Gilmore, his wife, the aforesaid building and the realty upon it was situated and said Jack W. Gilmore and Rose Winnick Gilmore took possession under the terms of said sale on said September 1st, 1955, and continued and were in possession thereof on the 27th day of September, 1955, at which time said property was damaged by fire.

Further Pleading and as a Second Further and Separate Defense to Plaintiffs' Complaint, this Defendant Alleges:

I.

Repeats and by reference thereto makes a part hereof as though fully set forth herein the allegations of the foregoing and First Further Defense and each and every allegation therein contained.

II.

That after the sale of said property and the delivery of possession thereof as above alleged, and

on or about September 2nd, 1955, the said Aubrey L. Owens and Emma T. Owens, in accordance with the terms of the aforementioned policy of insurance, which was in the statutory form, requested of this Defendant the cancellation of said policy and the return of the unearned premium thereon to them.

Further Pleading and as a Third Further and Separate Defense to Plaintiffs' Complaint, This Defendant Alleges:

I.

Repeats and by reference thereto makes a part hereof as though fully set forth herein each and every allegation in [21] the foregoing First and Second Further and Separate Defenses.

II.

That after the foregoing sale and delivery of possession of the property above described, Plaintiff C. R. Morris agreed with this Defendant that the foregoing policy of insurance be cancelled upon the procurement by the purchasers of other insurance insuring him as loss payee in the same or similar terms as the policy of insurance of this Defendant above referred to.

III.

That the aforesaid purchasers of said property did procure other insurance, to wit, \$5,000.00 with the Defendant The Home Insurance Company and \$5,000.00 with the Defendant The Canadian Fire

Insurance Company, which policies provided, as did this Defendant's cancelled policy, that loss thereunder be payable to the Plaintiffs as their respective interests may appear at the time of loss and said policies were in full force and effect on the date of said loss, to wit, on the 27th day of September, 1955.

Further Pleading and as a Fourth Further and Separate Defense to Plaintiffs' Complaint, This Defendant Alleges:

I.

That in this Defendant's policy of insurance, as above alleged, and in accordance with the terms and conditions of the Statutes of this State, it was provided:

"This company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not."

II.

That at the time of the loss alleged in Plaintiffs' Complaint, the whole insurance, if the policy of this Defendant was in effect at all, was the afore-said \$5,000.00 with The Home [22] Insurance Company and \$5,000.00 with The Canadian Fire Insurance Company and Defendant's policy of \$7,000.00, making the whole insurance \$17,000.00, and this Defendant, if its policy was in effect at all, became

liable for no greater proportion of the loss than \$7,000.00 bears to \$17,000.00, or 7/17 of the loss, if any.

Wherefore, this Defendant prays that Plaintiffs take nothing by their Complaint and that it go hence and have and recover its costs and disbursements herein.

/s/ E. EUGENE DAVIS;
HINDMAN & DAVIS;

By /s/ E. EUGENE DAVIS,
Attorney for Defendant, Tri-State Mutual Grain
Dealers Fire Insurance Company.

Affidavit of service by mail attached.

[Endorsed]: Filed January 17, 1957. [23]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT,
THE HOME INSURANCE COMPANY

Comes Now the Defendant, The Home Insurance Company, a stock company, and answering plaintiffs' complaint on file herein for itself alone and not for its co-defendants or any of them admits, denies, and alleges as follows:

I.

Admits the allegations contained in Paragraph I.

II.

Defendant here answering does not have sufficient knowledge, information, or belief either to admit or deny the allegations contained in Paragraph II; and, basing this answer on that ground, denies said allegations and each of them, both generally and specifically, and on that ground specifically denies that said plaintiffs own a beneficial interest in the property therein mentioned in the sum of [28] \$5,879.28 or in any other sum or amount whatsoever or at all.

III.

Defendant here answering does not have sufficient knowledge, information, or belief either to admit or deny the allegations contained in Paragraph III; and, basing this answer on that ground, denies said allegations and each of them, both generally and specifically, and on that ground specifically denies that said plaintiff Constance B. Honaker owns a beneficial interest in the property therein mentioned in the sum of \$2,462.21, or in any other sum or amount whatsoever or at all.

IV.

Answering Paragraph IV, admits that a fire occurred on a building situated upon the real property therein mentioned. Defendant here answering does not have sufficient knowledge, information, or belief either to admit or deny plaintiffs' allegations respecting the amount of said damage to said building; and, basing this answer on that ground, denies that said building was damaged in the amount set

forth in plaintiffs' complaint or in any other amount whatsoever or at all.

V.

Admits the allegations contained in Paragraph V.

VI.

Denies generally and specifically each and every, all and singular, the allegations contained in Paragraphs VI and VII.

Defendant alleges that it did prepare a policy of insurance wherein plaintiffs were designated as loss payees, and alleges on information and belief that The Canadian Fire Insurance Company did prepare a similar policy. Defendant, however, alleges that said policies of insurance of this answering defendant and of The Canadian Fire Insurance Company were not in force or effect at the time of the alleged loss; that said policies of insurance had never been delivered; that Rose Winnick Gilmore, who was named as the insured under said [29] policies of insurance, did not have an insurable interest in said property; that title to said property never passed to the named insured or said policies of insurance, to wit, Rose Winnick Gilmore; and therefore title had not passed to plaintiffs at the time of the alleged loss.

VII.

Denies generally and specifically each and every, all and singular, the allegations contained in Paragraph VIII, except that defendant admits that the

policy of insurance of defendant Tri-State Mutual Grain Dealers Fire Insurance Company was in full force and effect at the times mentioned in plaintiffs' complaint.

VIII.

Denies generally and specifically each and every, all and singular, the allegations contained in Paragraph IX insofar as this answering defendant is concerned. This answering defendant does not have sufficient knowledge, information, or belief either to admit or deny plaintiffs' allegations that the terms or conditions or obligations under the policies of fire insurance allegedly issued by its co-defendants had been performed or complied with.

IX.

Denies generally and specifically each and every, all and singular, the allegations contained in Paragraph X; and, except as herein specifically admitted, denies that there is now due, owing, or unpaid to plaintiff C. R. Morris from this answering defendant the sum of \$5,879.28 or any other sum or amount whatsoever or at all; and specifically denies that there is now due, owing, or unpaid to plaintiff Constance B. Honaker from this answering defendant the sum of \$2,462.21 or any other sum or amount whatsoever or at all.

Specifically denies that there was any loss payable to plaintiffs or either of them by this answering defendant by reason of any destruction or damage to the building mentioned in plaintiffs' complaint.

Admits that this answering defendant has refused to pay [30] plaintiffs or either of them.

Further Answering Plaintiffs' Complaint and for a First, Separate Defense Thereto, Defendant Alleges:

I.

That the policy of insurance of this answering defendant was never delivered to plaintiffs or either of them or to the person named as the insured in said policy, to wit, Rose Winnick Gilmore, or to any agents of said plaintiffs or either of them or to any agent of said Rose Winnick Gilmore.

Further Answering Plaintiffs' Complaint and for a Second, Separate Defense Thereto, Defendant Alleges:

I.

The policy of insurance herein sued upon provides that the named insured therein is Rose Winnick Gilmore.

Said policy of insurance further provides in part as follows: "Loss, if any, shall be adjusted with the insured specifically named, unless otherwise specified by (a) written agreement or (b) endorsement hereon."

That said policy of insurance does not specify any person other than the specifically named insured, to wit, Rose Winnick Gilmore, with whom any loss shall be adjusted.

Further Answering Plaintiffs' Complaint and for a
Third, Separate and Affirmative Defense
Thereto, Defendant Alleges:

I.

This answering defendant is informed and believes and on that ground alleges that at the time of the alleged loss set forth in plaintiffs' complaint, the ownership of said property had not passed to Rose Winnick Gilmore, who is named as the insured in the policy of insurance sued upon by plaintiffs; and that, therefore, [31] plaintiffs or either of them did not have any title to said property under Rose Winnick Gilmore.

II.

Defendant is informed and believes and therefore alleges that at the time of the alleged loss plaintiffs' interest, if any, in said property was insured under a policy of insurance issued to the then owner thereof by defendant Tri-State Mutual Grain Dealers Fire Insurance Company, and that their loss, if any, is covered under said policy of insurance and not under any policy of insurance of this answering defendant.

Further Answering Plaintiffs' Complaint and for a
Fourth, Separate and Affirmative Defense
Thereto, Defendant Alleges:

I.

The policy of insurance herein sued upon provides in part as follows:

“Requirements in Case Loss Occurs. The insured shall give written notice to this company of any loss without unnecessary delay, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; and within 60 days after the loss, unless such time is extended in writing by this company, the insured shall render to this company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto * * *”

And said policy further provides in part:

“When Loss Payable. The amount of loss for which this [32] company may be liable shall be payable 60 days after proof of loss, as herein provided, is received by this company and ascertainment of the loss is made either by agreement between the insured and this company expressed in writing or by the filing with this company of an award as herein provided.”

II.

That no proof of loss was rendered to defendant within sixty days after the alleged loss or any time

by the plaintiffs or either of them or by Rose Winnick Gilmore, which proof of loss is a condition precedent to recovery under said policy.

III.

Plaintiffs' action is prematurely brought in that no proof of loss has been submitted to defendant, nor has ascertainment of the loss been made either by agreement or by the filing of an award as set forth in said policy of insurance.

Further Answering Plaintiffs' Complaint and for a Fifth, Separate and Affirmative Defense Thereto, Defendant Alleges:

I.

The policy of insurance herein sued upon provides in part as follows:

"Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss."

II.

The alleged date of the loss as set forth in plaintiffs' complaint was the 27th day of September, 1955. The instant action was filed on September 27, 1956, and thus said action was not commenced within twelve months next after the inception of the loss, if any. [33]

Wherefore, defendant prays that plaintiffs take nothing by reason of their complaint and that defendant be hence dismissed with its costs of suit herein incurred and for such other and further relief as to the court may seem just.

/s/ THOMAS P. MENZIES,
Attorney for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 11, 1957. [34]

[Title of District Court and Cause.]

AMENDED PRETRIAL STIPULATION

Section I.

The following facts are admitted by and between the parties to this action:

1. That on the 27th day of September, 1955, a building located upon real property described as the North 140 feet of Riverview Farms in the County of San Diego, State of California, was damaged by fire.

2. That at the time of said fire, Rose W. Gilmore was in possession of said premises as purchaser from Aubrey L. Owens and Emo T. Owens, under a then pending escrow agreement.

3. That at the time of said fire loss, plaintiffs were respectively the beneficiaries of first and sec-

ond deeds of trust encumbering said real property. [36]

4. That prior to said fire loss, defendant, Tri-State Mutual Grain Dealers Fire Insurance Company (hereinafter referred to as Tri-State Company), was the insurer under their policy No. 4—16532, insuring against loss of said building by fire; that plaintiffs were respectively designated and named in a mortgagee clause attached to said policy as being named as loss payees to the loss payable thereunder.

5. That on December 3, 1955, plaintiff, C. R. Morris, filed proof of loss of his claim with defendant, Tri-State Company. That on April 3, 1956, plaintiff, Constance B. Honaker, filed proof of loss of her claim with defendant, Tri-State Company.

6. That prior to said fire loss, defendant, The Home Insurance Company (hereinafter referred to as The Home Company), did prepare its policy of insurance No. 7502, insuring against loss of said building wherein plaintiffs were respectively designated and named as beneficiaries in a mortgagee clause attached to said policy as being named as loss payees to the loss payable thereunder.

7. That prior to said fire loss, defendant, The Canadian Fire Insurance Company (hereinafter referred to as Canadian Company), did prepare its policy of insurance No. MF-104 777, insuring against loss of said building wherein plaintiffs were respectively designated and named as beneficiaries in

a mortgagee clause as being named as loss payees to the loss payable thereunder.

8. That defendants, Home Company and Canadian Company, collected and received from Rose W. Gilmore, a premium for their respective insurance policies above mentioned. That on March 5, 1956, defendants, Home Company and Canadian Company, mailed to said Rose W. Gilmore, a notice of cancellation of said policy, and did retain a portion of the premium so paid by Rose W. Gilmore.

9. The Home Company and Canadian Company policies were delivered to the named insured, Rose W. Gilmore. Neither of [37] said policies was delivered to Plaintiffs or either of them.

10. No proof of loss was rendered to Defendants, Home Company and Canadian Company, by the insured Rose W. Gilmore, or by Plaintiffs or either of them.

11. No money consideration passed between Rose W. Gilmore and Plaintiffs, C. R. Morris and Constance B. Honaker. The consideration, if any, which passed between Rose W. Gilmore and Plaintiffs arose by reason of the terms of the Trust Deed in favor of plaintiffs, and the contract and escrow instruction relating to the Agreement to Purchase said real property by Rose W. Gilmore. The Trust Deed in favor of Plaintiffs was executed and recorded prior to the Agreement to Purchase by said Rose W. Gilmore.

12. The Tri-State policy was in force and effect as to Plaintiffs' interests at the time of said loss.

13. The sum due Plaintiff, C. R. Morris, at the time of said loss on the promissory note, secured by the First Deed of Trust encumbering said real property, was the sum of \$5,790.39; the sum due Plaintiff, Constance B. Honaker, at the time of said loss on the promissory note secured by the Second Deed of Trust encumbering said real property, was the sum of \$2,357.68, the combined sums due plaintiffs at the time of said loss being \$8,148.07.

14. The loss occasioned by said fire was the sum of \$7,890.00.

Section II.

The issues of law which remain to be tried are as follows:

1. If the policies of all defendants are found to be in effect at the time of said loss, should the loss be apportioned between them, and if so, in what manner.

2. Issues of law raised by defendants, Home Company and Canadian Company, are as follows:

(a) Home Company and Canadian Company policies were not in [38] effect as to plaintiffs' interest at the time of loss.

(b) That plaintiffs' causes of action are barred by provisions contained in the Canadian Company and Home Company policies as follows: "loss, if

any, shall be adjusted with the insured specifically named, unless otherwise specified by (a) written agreement, or (b) endorsement thereon.”

(c) That the named insured, Rose W. Gilmore, did not have title to the subject property, and as such, plaintiffs or either of them, had no title to said property under Rose W. Gilmore.

(d) That the loss, if any, of plaintiffs’ interest was insured by defendant, Tri-State Company.

(e) The action herein was prematurely brought by reason of the fact that neither the insured, Rose W. Gilmore, or plaintiff, or either of them, rendered proof of loss to Defendants, Home Company and Canadian Company.

(f) Plaintiffs’ action is barred by the limitation period prescribed in Home Company and Canadian Company policies, the date of loss being September 27, 1955, and the date of filing of Plaintiffs’ complaint, September 27, 1956.

Section III.

Miscellaneous stipulations and list of documentary evidence is as follows:

1. The parties stipulate that the Court has jurisdiction over the subject matter and the parties by reason of diversity of citizenship, plaintiffs being residents of the State of California, defendant, Tri-State Company, being a citizen of the State of Minnesota, defendant, Canadian Company, being a

citizen of Winnipeg, Canada, and defendant, Home Company, being a citizen of New York.

2. It is stipulated by all parties that the following documents may be offered by plaintiff and may be admitted in evidence without objection thereto, except, that Defendants, Home Company and Canadian Company reserve the right to object [39] to the materiality of item (j).

(a) Promissory note and deed of trust in favor of plaintiff, C. R. Morris.

(b) Promissory note and deed of trust in favor of plaintiff, Constance B. Honaker.

(c) Tri-State Company insurance policy No. 4-16532.

(d) Memorandum of Canadian Company fire insurance policy, No. MF 104 777.

(e) Certificate of insurance of the Home Company policy, No. 7502.

(f) Cancellation notice, dated March 5, 1956, prepared and delivered by defendant, Home Company.

(g) Cancellation notice, dated March 5, 1956, prepared and delivered by Canadian Company.

(h) Letter dated May 10, 1956, from Franklin Insurance Corporation, as agent for defendants, Home and Canadian Companies, addressed to Mrs. Rose W. Gilmore, notifying her of the amount of the unearned premium, to be reimbursed to her, of the above-mentioned policies.

(i) Escrow instructions between Aubrey L. Owens and Emo T. Owens, as sellers, and Rose Winnick Gilmore, as buyer.

(j) Copy of letter dated June 8, 1956, from Yale, Wilson, Summers & Yale, Attorneys for Plaintiffs, addressed to all defendants, requesting adjustment of loss on behalf of Plaintiffs.

Respectfully submitted,

YALE, WILSON,
SUMMERS & YALE,

By /s/ WILLIAM A. YALE,
Attorneys for Plaintiffs.

/s/ THOMAS P. MENZIES,
Attorney for Defendants, The Home Insurance
Company and The Canadian Fire Insurance
Company.

HINDMAN & DAVIS,

By /s/ E. EUGENE DAVIS,
Attorneys for Defendant, Tri-State Mutual Grain
Dealers Fire Insurance Company, a Corpora-
tion.

Approved: 12/5/57.

/s/ JAMES M. CARTER,
District Judge.

[Endorsed]: Filed December 5, 1957. [40]

[Title of District Court and Cause.]

AMENDMENT TO ANSWER OF DEFENDANT TRI-STATE GRAIN DEALERS FIRE INSURANCE COMPANY

Order permitting filing Amendment to Answer having been duly made, Defendant, Tri-State Mutual Grain Dealers Fire Insurance Company, a corporation, files this amendment to its Fourth Further and Separate Defense to Plaintiffs' Complaint so that its Fourth Further and Separate Defense is amended to read as follows:

I.

That in this Defendant's policy of insurance, as above alleged, and in accordance with the terms and conditions of the Statutes of this State, it was provided:

"This company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not." [25]

II.

And said policy further provided as follows in mortgage clause attached thereto and made a part thereof:

"5. This company shall not be liable to the mortgagee for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the

peril involved, under policies issued to, held by, or payable to the mortgagee, whether collectible or not.”

III.

That at the time of the loss alleged in Plaintiffs' Complaint, the whole insurance covering the property described in the policy of this Defendant for loss by fire and held by and payable to the mortgagee Plaintiffs herein was in the amount of \$5,000.00 with Defendant, The Home Insurance Company, and in the amount of \$5,000.00 with Defendant, The Canadian Fire Insurance Company, and Defendant's policy of \$7,000.00, making the whole insurance \$17,000.00, and this Defendant became liable for no greater proportion of the loss than \$7,000.00 bears to \$17,000.00, or 7/17ths of the loss.

HINDMAN & DAVIS,

/s/ E. EUGENE DAVIS,

By /s/ E. EUGENE DAVIS,
Attorneys for Defendant, Tri-State Mutual Grain
Dealers Fire Insurance Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 5, 1958. [26]

[Title of District Court and Cause.]

MEMORANDUM

C. R. Morris, the holder of the first trust deed securing a note with \$5,790.39 due thereon, and

Constance B. Honaker, the holder of a second trust deed securing a note with \$2,357.68 due thereon, sue insurance companies under loss payable clauses in favor of mortgagees, contained in fire insurance policies.

The loss occasioned by the fire was stipulated to be \$7,890.00.

The fire occurred on September 27, 1955. On that date Aubrey L. Owens and Emma T. Owens were the owners of the fee. On that date Tri-State had in effect a fire insurance policy on the property naming the Owens as owner and specifically naming Morris and Honaker under a loss payable clause. [41]

Owens had gone into escrow to sell the property to Rose Gilmore and on September 27, 1955, the date of the fire, the escrow was not closed but Gilmore had gone into possession.

Prior to the fire, the Home Company and the Canadian Company had at the request of Gilmore, delivered to her their fire policies on the same property. Such policies insured Gilmore as owner and specifically named Morris and Honaker under loss payable clauses.

Tri-State concedes its liability but claims Home and Canadian should bear their proportional share of the loss.

We conclude there is no liability on Home or Canadian.

(1) The escrow had not closed. Rose Gilmore, the assured of Home and Canadian, had no title to the real property and no insurable interest, Sec. 280 California Insurance Code.

(2) The Home and Canadian policies were to be substituted for the Tri-State policies at close of escrow and the instructions provided for prorate of premiums on Tri-State's policy. Though delivered to Gilmore they did not become effective as to Gilmore or Morris and Honaker, until the escrow closed.

(3) Until the escrow closed the Owensens were the owners and had the insurable interest, *Vierneisel v. Rhode Island Ins. Co.*, [1946] Cal. App. 2d, 175 Pac. 2d 63.

(4) The fact that Home and Canadian later cancelled their policies and charged Gilmore a prorated premium gives no comfort or rights to Tri-State. This was a matter entirely between Gilmore and the Home and Canadian companies. [42]

(5) It's common knowledge in connection with escrows, that new insurance to be substituted must be written or dated prior to the close of escrow. The date of close of escrow cannot often be accurately gauged. Thus, when the escrow closes, the old insurance is cancelled, premiums are prorated and rebated and the new insurance becomes effective.

(6) Sec. 1662 Civil Code cited by Tri-State merely provides who has risk of loss between pur-

chaser and vendor. It does not affect this case. Since Gilmore had gone into possession, she "is not thereby relieved from a duty to pay the price nor is (s)he entitled to recover any portion thereof that (s)he has paid." Sec. 1662 Civil Code. But she was clearly entitled to an assignment of the Tri-State Insurance. *Vierneisel v. Rhode Island Ins. Co.* (supra).

Here however, the loss, \$7,890.00, and the payment of that sum by the insurance carrier was not even sufficient to cover the two loss payable clauses totaling \$8,148.07. There was therefore nothing for her to claim from the fire insurance.

(7) It might be well to here analyze how these loss payable clauses come into existence and operate.

A party buys a home. He takes out fire insurance. If the house is clear, all the insurance is payable to him.

If there is an encumbrance on the property, then a condition of that trust deed or mortgage, uniformly requires that the owner (a) keep the property insured, and (b) provide for payment first out of the proceeds of fire insurance, to the holder of the encumbrance to the extent of his interest (the loss payable clause). [43]

Thus, whether the owner himself (1) executes the trust deed, or (2) takes the fee subject to it or (3) assumes and agrees to pay the encumbrance, it is a breach of the obligations of the trust deed and a ground for default and foreclosure if in-

insurance is not kept in force with the loss payable clause.

Therefore the owner himself instructs the insurance company to insert the loss payable clause. He has in fact assigned a part of the proceeds he would otherwise obtain. Or the insurance contract as to the mortgagee-beneficiaries might be called loosely a contract for the benefit of the mortgagees as third party beneficiaries.

The essential point is that although these beneficiaries have rights and may sue the insurance company, their right depends on the validity of the insurance written for the owners. If the owner had no insurable interest then of course the owner had no rights to, in substance, assign to the mortgagees under the loss payable clauses.

(8) The policies of Canadian and Home provide specifically, "Loss, if any, shall be adjusted with the insured specially named, unless otherwise specified by (a) written agreement or (b) endorsement thereon." This is listed as issue 2(b) in the pre-trial stipulation and is set up as Home and Canadian's second defense. We think it is good.

(9) Issue 2(e) of the pretrial stipulation, also Home and Canadian's fourth separate defense, raises the question as to whether the action was prematurely brought since neither the insured Gilmore nor plaintiff or either of them rendered proof of loss to defendants, Home and Canadian. We think this issue must be resolved against defend-

ants, Home and Canadian, since their policies provide that "If the insured fails to render proof of loss, such mortgagee, [44] upon notice, shall render proof of loss * * * within sixty days thereafter * * *." No notice was given to the mortgagee plaintiffs to file proof of loss.

(10) Home and Canadian contend that the action is barred by the twelve months' period of limitation set forth in their policies. The loss occurred September 27, 1955; the complaint was filed September 27, 1956. This is apparently 2(f) of the pretrial stipulation and defendant Home and Canadian's fifth defense. We think the defense bad.

Section 10 of the Civil Code and Section 12 of the Code of Civil Procedure are identical, and read: "The time in which any act provided by law is to be done is to be computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded." It is true that each section refers to an act "provided by law is to be done." The sections would thus be clear as to matters such as notices of appeal, motions for new trial, etc. However, the sections have been applied to contracts and the cases have held that the first day is to be excluded, *Johnson v. Kaeser* [1925], 196 Cal. 686; to insurance policies, *Law v. Northern Assurance Co. of London*, [1913] 165 Cal. 394; promissory notes, *Rauer v. Browder*, [1895] 107 Cal. 282.

The laws of the state are automatically part of insurance policies. The action filed on September

27, 1956, was within the twelve months' period provided in the policy.

(11) Morris made proof of loss with Tri-State on December 3, 1955. He prays interest from January 1, 1956. Honaker made proof of loss with Tri-State on April 3, 1956. She prays interest from June 1, 1956. The amount of loss was easily susceptible of ascertainment. It was in fact stipulated to when the court pressed for a pretrial stipulation thereon. [45]

Both parties are entitled to interest as prayed, *Chase v. National Indemnity Co.* [1954], 129 C. A. 2d 853.

(12) The liability of Tri-State is the amount of the loss, \$7,890.00. The Morris trust deed is a first. His recovery is \$5,790.39 plus interest. Honaker, with the second trust deed will recover \$2,099.61 plus interest. Both plaintiffs will have costs against Tri-State.

Plaintiffs will take nothing from Home or Canadian. Tri-State has actually no prayer or pleading asking relief against Home or Canadian. Its prayer asks only that plaintiffs take nothing.

By amendment to its answer filed February 5, 1958, Tri-State amends its fourth defense and alleges its liability to be only 7/17ths of the loss.

Our holding that Tri-State alone is liable disposes of this phase of the case. Canadian and Home will recover their costs.

The plaintiff will prepare, serve and lodge findings of fact, conclusions of law and judgment in one document within the time prescribed for in the Rules.

Dated: March 28, 1958

/s/ JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed March 27, 1958. [46]

In the United States District Court, Southern
District of California, Southern Division
No. 1978 SD-C

C. R. MORRIS and CONSTANCE B.
HONAKER,

Plaintiffs

vs.

TRI-STATE MUTUAL GRAIN DEALERS
FIRE INSURANCE COMPANY, a Corpora-
tion; THE HOME INSURANCE COMPANY,
a Stock Company; THE CANADIAN FIRE
INSURANCE COMPANY, a Stock Company,

Defendants.

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND JUDGMENT

The above cause came on regularly for trial on
February 3, 1958, before Honorable James M.

Carter, Judge, sitting without a jury, Yale, Wilson, Summers & Yale, by William A. Yale, appearing as attorneys for Plaintiffs; Hindman & Davis, by E. Eugene Davis, appearing as attorneys for defendant, Tri-State Mutual Grain Dealers Fire Insurance Company, a Corporation; and Thomas P. Menzies appearing as attorney for defendants, The Home Insurance Company, a Stock Company, and The Canadian Fire Insurance Company, a Stock Company; and a Pretrial Stipulation, together with Memoranda of Points and Authorities having been submitted by the parties, oral and documentary evidence having been introduced, and said [47] matter having been submitted for decision after oral argument, the Court being fully advised, makes the following Findings of Fact:

FINDINGS OF FACT

I.

Plaintiffs are each citizens of the State of California; defendant, Tri-State Company, is a citizen of the State of Minnesota; defendant, Home Company, is a citizen of the State of New York; defendant, Canadian Company, is a citizen of Winnipeg, Canada; that all defendants on the 27th day of September, 1955, were doing business in the State of California; that the amount in controversy exceeds the sum of \$3000.00 exclusive of interest.

II.

That on the 27th day of September, 1955, a building located upon real property described as the

North 140 feet of Riverview Farms in the County of San Diego, State of California, was damaged by fire; that plaintiffs' action herein was filed on the 27th day of September, 1956; that the policies of insurance of the defendant, Home Company and Canadian Company, provided in part as follows:

“Suit

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss.”

“Mortgagee Interests and Obligations * * *

If the insured fails to render proof of loss, such mortgagee, upon notice, shall render proof of loss in the form herein specified, within sixty (60) days thereafter, and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit * * *” [48]

III.

That at the time of said fire, Rose W. Gilmore was in possession of said premises as purchaser from Aubrey L. Owens and Emo T. Owens, under the pending escrow agreement; that at the time of said fire loss, said escrow had not been closed, and the deed from Aubrey L. Owens and Emo T. Owens had not been delivered to Rose W. Gilmore.

IV.

That at the time of said fire loss, plaintiffs were respectively the beneficiaries of first and second deeds of trust encumbering said real property; the sum due plaintiff, C. R. Morris, at the time of said loss on the promissory note secured by the first deed of trust encumbering said real property, was the sum of \$5,790.39; the sum due Constance B. Honaker at the time of said loss, on the promissory note secured by the second deed of trust encumbering said real property, was the sum of \$2,357.68; the combined sums due plaintiffs at the time of said loss being \$8,148.07.

V.

That on the 27th day of September, 1955, at the time of the aforementioned damage and destruction to said building by fire, defendant, Tri-State Company, was the insurer against loss or damage to said building by fire, in the sum of \$7000.00, under its policy No. 4-16532; that said policy of insurance named Aubrey L. Owens and Emo T. Owens as the named insureds under said policy; that under a mortgagee clause attached to said policy of insurance, plaintiffs, C. R. Morris and Constance B. Honaker, were respectively designated and named as being entitled to the loss payable under said policy to the extent of their interests under their aforementioned deeds of trust.

VI.

That prior to said fire loss, defendant, Home Company, did prepare its policy of insurance No.

7502, in the amount of \$5000.00 insuring against loss of said building by fire, wherein Rose Gilmore was designated as the insured, [49] and the plaintiffs were respectively designated and named as beneficiaries in a mortgagee clause attached to said policy as being entitled to the loss payable thereunder to the extent of their interests under their aforementioned deeds of trust.

VII.

That prior to said fire loss, defendant, Canadian Company, did prepare its policy of insurance No. MF-104 777, in the amount of \$5000.00, insuring against loss of said building by fire, wherein Rose Gilmore was designated as the insured and the plaintiffs were respectively designated and named as beneficiaries in a mortgagee clause as being entitled to the loss payable thereunder to the extent of their interests under their aforementioned deeds of trust.

VIII.

That defendants, Home Company and Canadian Company, collected and received from Rose W. Gilmore, a premium for their respective insurance policies above mentioned. That on March 5, 1956, defendants, Home Company and Canadian Company, mailed to said Rose W. Gilmore, a notice of cancellation of said policy, and did retain a portion of the premium so paid by Rose W. Gilmore.

IX.

The Home Company and Canadian Company policies were delivered to the named insured, Rose

W. Gilmore prior to the fire. Neither of said policies was delivered to plaintiffs nor either of them.

X.

That on December 3, 1955, plaintiff, C. R. Morris, filed proof of loss of his claim with defendant, Tri-State Company. That on April 3, 1956, plaintiff, Constance B. Honaker, filed proof of loss of her claim with defendant, Tri-State Company. No proof of loss was rendered to defendants Home Company and Canadian Company by the insured, Rose W. Gilmore, or by plaintiffs, or either of them. [50]

XI.

No money consideration passed between Rose W. Gilmore and plaintiff, C. R. Morris, and/or Constance B. Honaker.

XII.

The loss occasioned by said fire was stipulated to be the sum of \$7,890.00; that the amount of said loss was easily susceptible of ascertainment.

XIII.

That defendant, Tri-State Company, has stipulated in this case that its policy of insurance was in force and effect as to the interests of plaintiffs and each of them, at the time of said loss.

XIV.

The policy of Tri-State Company provides in part as follows:

“When Loss Payable. The amount of loss for which this Company may be liable shall be payable sixty (60) days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing, or, by the filing with this Company of an award as herein provided;”

That defendant, Tri-State failed and neglected to ascertain said loss although the same was easily susceptible of ascertainment.

XV.

That the policies of defendants, Home and Canadian Companies, provided in part as follows:

“Loss, if any, shall be adjusted with the insured specifically named, unless otherwise specified by

(a) written agreement, or

(b) endorsement thereon;”

That the loss was not adjusted by the named insured under said policies with defendants Home and Canadian Companies, nor was there a written agreement or endorsement on said policy otherwise [51] specifying the method of adjusting said loss.

XVI.

That the policies of defendants, Home and Canadian Companies, provided in part as follows:

“If the insured fails to render proof of loss, such mortgagee, upon notice, shall render proof of loss in the form herein specified, within sixty (60) days thereafter * * *”

That the named insured, Rose W. Gilmore, failed to render proof of loss under said policies. That no notice was given by defendants, Home Company and Canadian Company to mortgagee plaintiffs to render proof of loss.

XVII.

That the policy of defendant, Tri-State Company, provided in part as follows:

“This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not,” and,

“This Company shall not be liable to the mortgagee for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved under policies issued to, held by, or payable to the mortgagee, whether collectible or not.”

The policies of Home Insurance Co. and Canadian Fire Insurance Co. contain provisions substantially the same.

Conclusions of Law

From the foregoing facts the Court makes the following Conclusions of Law:

1. That this Court has jurisdiction over the parties to, and the subject matter of, this action.

2. That on September 27, 1955, the date of said fire loss, Aubrey L. Owens and Emo T. Owens, were the owners in fee of said real property and had the insurable interest therein. That Rose W. Gilmore had no title to said real property and had no insurable interest therein. [52]

3. That on the date of said fire loss, defendant, Tri-State Company, had, in effect, a fire insurance policy on said real property and plaintiffs being named as mortgagees in the mortgagee clause under said policy are entitled to the loss payable thereunder.

4. That the policies of insurance prepared by Home Company and Canadian Company, although delivered to Rose W. Gilmore, were not to become effective as to Rose W. Gilmore or plaintiffs or either of them, until said escrow closed; that said policies were to be substituted for the Tri-State policy at the close of said escrow; that said escrow had not closed at the time of said loss and the policies of defendants Home Company and Canadian Company, were not in force and effect at such time.

5. That under the policies of defendants, Home Company and Canadian Company, it was necessary that the loss be adjusted with the named insured, Rose W. Gilmore.

6. That it was not necessary that plaintiffs render proof of loss to defendants, Home Company and Canadian Company, in that said defendants had not notified plaintiffs that the named insured, Rose W. Gilmore, had failed to render proof of loss.

7. That plaintiffs' action is not barred by the limitation period prescribed in the policies of defendants, Home Company and Canadian Company.

8. That plaintiffs are entitled to interest at the rate of 6% per annum from defendant, Tri-State Company on the amounts due them under this judgment, said interest to commence sixty (60) days after the filing of their respective proofs of loss with defendant, Tri-State Company.

9. That defendant, Tri-State Company alone, is liable to plaintiffs for said loss under its policy, in the sum of \$7000.00; that the amount of said fire loss and the combined sums due plaintiffs on their trust deed notes at the time of said loss exceeds the amount [53] due from the defendant, Tri-State Company; that the deed of trust in favor of C. R. Morris, is a first deed of trust, and said Plaintiff is entitled to judgment in the sum of \$5,790.39, together with interest thereon at the rate of 6% per annum, from February 3, 1956, to date of entry of judgment herein; plaintiff, Constance B. Honaker, is entitled to judgment for the balance of said insurance coverage in the amount of \$1209.61, together with interest thereon at the rate of 6% per

annum from June 3, 1956, to the date of entry of judgment herein.

10. That Plaintiffs are entitled to their costs of suit from defendant, Tri-State Company.

11. That Plaintiffs are entitled to take nothing from defendants, Home Company or Canadian Company, and defendants, Home Company and Canadian Company, are entitled to their costs of suit from plaintiff.

12. The Court incorporates by reference as part of these findings and conclusions, its Memo of decision filed March 27, 1958, except where inconsistent with these findings and conclusions.

Judgment

It is Ordered, Adjudged and Decreed that plaintiff, C. R. Morris, have judgment against defendant, Tri-State Insurance Company, in the sum of \$5790.39, together with interest at the rate of 6% per annum from June 3, 1956, to date of judgment, in the sum of \$833.50, making a total judgment of \$6623.89; that plaintiff Constance B. Honaker, have judgement against defendant Tri-State Insurance Company, in the sum of \$1209.61, together with interest at the rate of 6% per annum from June 3, 1956, to date of judgment in the sum of \$150.31, making a total judgment of \$1359.92; that plaintiffs are awarded their costs of suit from defendant, Tri-State Insurance Company, in the sum of \$26.45; that plaintiffs take nothing from defendants, Home

Company and Canadian Company, or either of them, and that defendants, Home Company and Canadian Company, are awarded their costs of suit from plaintiffs in the sum of

Dated: 6/30/58.

/s/ JAMES M. CARTER,
U. S. District Judge

Affidavit of service by mail attached.

Lodged June 24, 1958.

[Endorsed]: Filed June 30, 1958.

Entered July 3, 1958. [55]

[Title of District Court and Cause.]

MINUTES OF THE COURT

July 28, 1958

Present: Hon. James M. Carter,
District Judge.

Proceedings:

It Is Ordered that defendant Tri-State motion for new trial be, and it hereby is, denied.

(Copies to counsel)

JOHN A. CHILDRESS,
Clerk.

By /s/ WILLIAM W. LUDDY,
Deputy Clerk. [57]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM JUDGMENT

To the Above-Entitled Court and Its Clerk; and to the Plaintiffs, and Each of Them, and to Their Attorneys, Yale, Wilson, Summers & Yale; and to Defendant, The Home Insurance Company and The Canadian Fire Insurance Company, and Their Attorney, Thomas P. Menzies:

Please Take Notice that defendant, Tri-State Mutual Grain Dealers Fire Insurance Company, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment, and each and every part thereof, entered in the above-entitled cause on July 3rd, 1958, in favor of plaintiffs and against this defendant.

Dated: This 21st day of August, 1958.

HINDMAN & DAVIS,

By /s/ E. EUGENE DAVIS,
Attorneys for Said Defendant
and Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 22, 1958. [58]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents that Tri-State Mutual Grain Dealers Fire Insurance Company, a corporation, as principal, and Hartford Accident & Indemnity Company, a corporate surety, as surety, authorized to do and doing business in the State of California as a corporate surety, are held and firmly bound unto C. R. Morris and Constance B. Honaker, and each of them, plaintiffs above named, in the penal sum of \$250.00, which sum well and truly to be paid to said plaintiffs, the said principal and surety above named bind themselves, their successors and assigns firmly by these presents.

The condition of the above obligation is such that,

Whereas, the above-named principal, Tri-State Mutual Grain Dealers Fire Insurance Company, has appealed or is about to appeal to the United States Court of Appeals for the Ninth Circuit from that certain judgment, and each and every part thereof, entered in [60] the above-entitled court on July 3rd, 1958, in favor of plaintiffs and against defendant, Tri-State Mutual Grain Dealers Fire Insurance Company.

Now, Therefore, if the above-named Tri-State Mutual Grain Dealers Fire Insurance Company, a corporation, shall prosecute said appeal to effect and answer all costs which may be adjudged against it if the appeal is dismissed or the judgment entered be affirmed or such costs as the appellate court may

award if the judgment be modified, then this obligation shall be void, otherwise to remain in full force and effect.

In Witness Whereof, the above-named principal and surety have caused these presents to be executed at Los Angeles, California, this 21st day of August, 1958.

TRI-STATE MUTUAL GRAIN DEALERS INSURANCE COMPANY,

By /s/ E. EUGENE DAVIS,
Its Attorney.

HARTFORD ACCIDENT &
INDEMNITY COMPANY,

By /s/ CLARA VENTSAM,
Attorney in Fact.

State of California,
County of Los Angeles—ss.

On this 21st day of August, in the year 1958, before me, Lillian L. Barnes, a Notary Public in and for said County, residing therein, duly commissioned and sworn, personally appeared Clara Ventsam, known to me to be the Attorney-in-Fact of the Hartford Accident and Indemnity Company, the Corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the Corporation therein named, and she acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

/s/ LILLIAN L. BARNES,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires October 31, 1961.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 22, 1958. [61]

[Title of District Court and Cause.]

STATEMENT OF APPELLANT'S POINTS ON APPEAL

I.

The Court erred in finding that Appellant's limit of liability was not limited to the proportion of the loss that the amount of its insurance bore to all the other insurance on the property at the time of the loss.

II.

The Court erred in finding that the policies of insurance executed and delivered by Home Insurance Company and Canadian Fire Insurance Company were not in full force and effect at the time of the loss.

III.

The Court erred in finding that Rose Gilmore did not have an insurable interest in the property at the time of the loss.

IV.

The Court erred in finding that the amount of the loss was easily ascertainable. [66]

V.

The Court erred in assessing interest against Appellant.

VI.

The Court erred in its conclusion that Rose Gilmore had no insurable interest in the property destroyed.

VII.

The Court erred in finding and concluding that policies of insurance of Home Insurance Company and Canadian Fire Insurance Company were not in force and effect at the time of the fire.

/s/ E. EUGENE DAVIS,

HINDMAN & DAVIS,

By /s/ E. EUGENE DAVIS,

Attorneys for Defendant and Appellant Tri-State Mutual Grain Dealers Fire Insurance Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 27, 1958. [67]

[Title of District Court and Cause.]

NOTICE OF CROSS-APPEAL BY
PLAINTIFFS FROM PART OF JUDGMENT

To the Above-Entitled Court and its Clerk, and to
the Defendants, The Home Insurance Company,

and The Canadian Fire Insurance Company, and Their Attorney, Thomas P. Menzies, and Defendant, Tri-State Mutual Grain Dealers Fire Insurance Company, and its Attorneys, Hindman & Davis:

Notice is Hereby Given, that Plaintiffs, C. R. Morris and Constance B. Honaker, hereby cross-appeal to the United States Court of Appeals for the 9th Circuit, from a part of the judgment entered in this action on July 3, 1958, the part of said judgment hereby appealed from is the portion thereof wherein it was ordered, adjudged and decreed that Plaintiffs take nothing [69] from Defendants, The Home Insurance Company and The Canadian Fire Insurance Company, or either of them, and that Defendants, The Home Insurance Company and The Canadian Fire Insurance Company were awarded their costs of suit from Plaintiffs.

Dated: August 27, 1958.

YALE, WILSON,
SUMMERS & YALE,

By /s/ WILLIAM A. YALE,
Attorneys for Plaintiffs and Cross-Appellants C. R.
Morris and Constance B. Honaker.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 27, 1958. [70]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents, that C. R. Morris and Constance B. Honaker, as principals, and Fidelity and Deposit Company of Maryland, a corporate surety, as surety, authorized to do and doing business in the State of California, as a corporate surety, are held and firmly bound unto The Home Insurance Company and The Canadian Fire Insurance Company, and each of them, Defendants above named, in the penal sum of \$250.00, which sum well and truly to be paid to said defendants, the said principal and surety above named bind themselves, their successors and assigns firmly by these presents.

The condition of the above obligation is such that,

Whereas, the above-named principals, C. R. Morris and Constance B. Honaker, have appealed or are about to appeal to the United States Court of Appeals for the Ninth Circuit from a part of that certain judgment entered in the above-entitled Court on July 3, 1958, the part appealed from being in favor of Defendants, The Home Insurance Company and The Canadian Fire Insurance Company.

Now, Therefore, if the above-named Plaintiffs, C. R. Morris and Constance B. Honaker, shall prosecute said appeal to effect and answer all costs which may be adjudged against them if the appeal

is dismissed or the judgment entered be affirmed or such costs as the appellate court may award if the judgment be modified, then this obligation shall be void, otherwise to remain in full force and effect.

In Witness Whereof, the above-named principals and surety have caused these presents to be executed at San Diego, California, this 27th day of August, 1958.

C. R. MORRIS &
CONSTANCE B. HONAKER,
Plaintiffs,

By /s/ WILLIAM A. YALE,
Their Attorney.

FIDELITY & DEPOSIT
COMPANY OF MARYLAND,

By /s/ JAMES W. SURRY,
Attorney in Fact.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 27, 1958. [73]

[Title of District Court and Cause.]

STATEMENT OF CROSS-APPELLANTS'
POINTS ON APPEAL

I.

The Court erred in finding that the policies of insurance executed and delivered by Home Insurance

Company and Canadian Fire Insurance Company were not in full force and effect at the time of the loss.

II.

The Court erred in finding that Rose Gilmore did not have an insurable interest in the property at the time of the loss.

III.

The Court erred in its conclusion that Rose Gilmore had no insurable interest in the property [77] destroyed.

IV.

The Court erred in finding and concluding that policies of insurance of Home Insurance Company and Canadian Fire Insurance Company were not in force and effect at the time of the fire.

YALE, WILSON,
SUMMERS & YALE,

By /s/ WILLIAM A. YALE,
Attorneys for Plaintiffs and
Cross-Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 10, 1958. [78]

In the District Court of the United States, Southern
District of California, Southern Division

No. 1978-SD-C

C. R. MORRIS and CONSTANCE B. HONAKER,
Plaintiffs,

vs.

TRI-STATE MUTUAL GRAIN DEALERS
FIRE INSURANCE COMPANY, a Corpora-
tion; THE HOME INSURANCE COMPANY,
a Stock Company; THE CANADIAN FIRE
INSURANCE COMPANY, a Stock Company,
Defendants.

Honorable James M. Carter, Judge Presiding.

REPORTER'S TRANSCRIPT OF TRIAL
February 3, 1958

Appearances of Counsel

For Plaintiffs:

YALE, WILSON, SUMMERS & YALE,
WILLIAM A. YALE, ESQ.,
438 San Diego Trust & Savings,
San Diego 1, California.

For Defendant The Canadian Fire Insurance
Company:

THOMAS P. MENZIES, ESQ.,
803 Rowan Building,
458 South Spring Street,
Los Angeles 13, California.

For Defendant Tri-State Mutual Grain Dealers
Fire Insurance Company:

HINDMAN & DAVIS, by
E. EUGENE DAVIS, ESQ.,
636 South Serrano Ave,
Los Angeles 5, California.

The Clerk: No. 1978-SD-C, C. R. Morris, et al.,
vs. Tri-State Mutual, etc., et al. For trial.

Mr. Yale: Ready on behalf of plaintiffs C. R.
Morris and Constance B. Honaker.

Mr. Menzies: Ready for Canadian Home, your
Honor.

Mr. Davis: Ready for Tri-State Mutual, your
Honor, except that I would like to offer an amend-
ment to my Answer. I think it is probably con-
sidered amended anyway.

At page 4 of the Answer, the first paragraph, the
affirmative defense, on line 21, I would like to add
the following, which has already been discussed in
the memorandum filed in October and was inad-
vertently omitted from this paragraph:

“That said policy also contained the follow-
ing provision: ‘This company shall not be liable
to the mortgagee for a greater proportion of
any loss than the amount hereby insured shall
bear to the whole insurance covering the prop-
erty against the peril involved under policies
issued to, held by or payable to the mortgagee,
whether collectible or not.’ ”

I move that my Answer be amended by adding that

phrase. It is [3*] in the policy that it is stipulated will be introduced.

The Court: The motion will be granted. You may amend by filing a separate amendment, because the Clerk cannot get this down and there is not room to interline here. File a separate amendment to paragraph I of your fourth defense. You may do that within five days.

Mr. Yale: May I suggest, your Honor, to expedite the matter, that he is merely incorporating a provision of the policy. Plaintiffs would be pleased to stipulate that he may incorporate all provisions of the policy in his Answer, to facilitate the matter.

Mr. Davis: I am perfectly willing, although that may——

The Court: It is a simple matter to have somebody type this amendment and file it with the clerk.

Proceed.

Mr. Yale: If the Court please, I have discussed the matter with both counsel for the defendants this morning, and it seems to be fairly well agreed between all of us that the factual situations have been disposed of by the Amended Pretrial Stipulation. Actually, there are no further facts to be resolved or disposed of in this matter. I think it is fortunate that we have been able to agree upon the facts involved, and counsel seem to be of the belief that, on the basis of the memorandums that have been filed, the matter [4] should be submitted. However, I am perfectly pleased to argue the matter at this time.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

The Court: None of your documents is in evidence.

Mr. Yale: With one exception, I have all the exhibits at this time, if the Court please.

The Court: Hand them to the Clerk. Do they run from A to J, as set forth in the Pretrial Stipulation?

Mr. Yale: I have not marked them as such.

The Court: Hand them to the Clerk and he will mark them in that order.

First is the promissory note in favor of plaintiff Morris.

Mr. Yale: That and the deed of trust in favor of Morris could be considered as one exhibit.

The Court: All right. It is not the ordinary practice, but so that we will have the same numbers as appear in the stipulation, we will call that Exhibit A.

Mr. Yale: The next would be the promissory note and deed of trust in favor of plaintiff Constance Honaker. They are offered as one exhibit.

The Court: They are received as Plaintiff's Exhibit B.

Mr. Yale: Next would be the policy of insurance in Tri-State Mutual.

The Court: Exhibit C, received in evidence. [5]

Mr. Yale: Next would be what is called a Memorandum of Insurance of the Canadian Fire Insurance Company.

The Court: Exhibit D in evidence.

Mr. Yale: Next would be this Certificate of Insurance of the Home Insurance Company.

The Court: Exhibit E in evidence.

Mr. Yale: Next would be the Notice of Cancellation.

The Court: Exhibit F is a Cancellation Notice prepared by Home.

Mr. Yale: It is so offered.

The Court: Exhibit F received in evidence.

Exhibit G is a Cancellation Notice prepared by Canadian.

Mr. Yale: So offered.

The Court: Exhibit G received in evidence.

Exhibit H is a letter from Franklin Insurance Service Corporation, dated May 10, 1956.

Mr. Yale: That is correct.

The Court: Exhibit H received in evidence.

Exhibit I is Escrow Instructions between Owens and Gilmore.

Mr. Yale: That is correct.

The Court: Exhibit I received in evidence.

Exhibit J is a letter from Yale, Wilson, Summers & Yale. [6]

Mr. Menzies: We object to that on the grounds that it is incompetent, irrelevant and immaterial, your Honor. It is merely a statement of counsel. It doesn't relate to the facts or prove or disprove any of the facts in issue.

The Court: Let's see it.

Mr. Yale: I might explain why we would like to have it, your Honor (handing document to the Court).

The Court: Everybody concedes that the letter was sent. There is no question about foundation.

Mr. Menzies: No, your Honor.

The Court: The letter was sent by plaintiffs' attorneys, and received by the defendants, I take it.

Mr. Davis: Yes, your Honor.

The Court: What does it add, Mr. Yale?

Mr. Yale: It adds this, we believe, your Honor. We feel that an issue is going to be involved, one remaining issue as a matter of law, whether interest should run on this judgment from the time that it became due, and we feel that if the Court has some problem fixing the date when interest should run from a refusal to honor the policies or to pay the loss that this may perhaps fix a date that the Court may select to have interest on the judgment.

The Court: For that limited purpose there would be no objection?

Mr. Davis: This may not be material to my side of [7] the case. But I, too, think that it is irrelevant and immaterial as showing notice having been given to all the insurance companies and claim being made, which would be one of the prerequisites.

Mr. Menzies: We object to it on the grounds that there is an unliquidated amount. Interest couldn't run for the reason that the amount stipulated in the Pretrial Order is less than the amount claimed.

The Court: I think maybe your point about interest on an unliquidated demand might be good.

Mr. Yale: I have cases and I am prepared to

argue that matter as to when I feel interest will be allowable.

The Court: I will overrule the objection and receive it in evidence.

Mark it, Mr. Clerk, as Exhibit J in evidence.

(The documents above described were marked and received in evidence respectively as Plaintiffs' Exhibits A to J, inclusive.)

Mr. Menzies: There is one thing that you neglected in your Pretrial Order to state clearly enough, and I understand that we are all agreed on this point, and that is that even to date the escrow between the parties has never been closed. Is that correct?

Mr. Davis: I know nothing about it.

Mr. Yale: It is my understanding that the escrow [8] has not been closed.

The Court: If either of you know, make the statement.

Mr. Yale: I know of my own personal knowledge.

The Court: It is stipulated, then, that the escrow has never been closed.

Mr. Yale: It has never been closed.

Mr. Menzies: Title hasn't passed; it still remains in escrow.

Mr. Davis: I don't know what materiality it has.

The Court: Whether material or not, it is stipulated, is that right?

Mr. Yale: So stipulated.

Mr. Menzies: So stipulated.

Mr. Davis: Yes.

Mr. Yale: I was going to offer some additional documents that have come to my attention. Counsel has indicated that they are immaterial. I would like to suggest this:

Would it be stipulated that at the time the Home and Canadian company policies were cancelled that the Home and Canadian Companies knew of the particular loss?

Mr. Menzies: I assume that they did. They didn't receive any——

Mr. Yale: They didn't receive any formal notice, but—— [9]

Mr. Menzies: ——notice in accordance with the terms and conditions of the policy.

Mr. Yale: One additional stipulation that I would like to ask, Mr. Menzies, would be that the Home Insurance Company and the Canadian Fire Insurance Company were aware of the loss at the time that they cancelled the policies and made a pro rata refund of the premium. These documents reflect that, Mr. Menzies.

Mr. Menzies: I would assume that that is true.

The Court: Is it so agreed, then? So stipulated?

Mr. Menzies: So stipulated. But they didn't receive that notice from any of the named insureds in the policy.

The Court: Do you stipulate, too, Mr. Davis?

Mr. Davis: Yes, your Honor.

The Court: The stipulation is that the Canadian and the Home were aware of the fire loss at the

time when they cancelled their policies, but the stipulation does not mean that Mr. Menzies is conceding that any notices that might have been required under the policy were sent, advising of the loss.

Mr. Menzies: That is correct.

The Court: All right.

Mr. Yale: Your Honor please, I might just make casual comment as to what I believe the essence of the case is, [10] if the Court is so inclined.

The Court: All right, let's hear you now.

The case is concluded as to evidence, then. The Pretrial Stipulation will be considered as part of the record on the trial, the documentary evidence has been received, we have two other stipulations, here, and an amendment to the Fourth Defense of Mr. Davis, and the case is now ready for argument. Is that right?

Mr. Yale: That is right, your Honor.

Mr. Menzies: That is right.

Mr. Davis: That's right.

The Court: All right.

Plaintiffs' Argument

Mr. Yale: I would like to call the Court's attention to the fact that the defendant Tri-State concedes that its policy was in full force and effect as to these plaintiffs at the time of the loss involved—that is so conceded in the Amended Pretrial Stipulation, and the defendant Tri-State has never paid or deposited any of its loss payable under those policies, and the issue seems to be the ques-

tion: Are these other two companies responsible, under their policies, to contribute to the payment of the loss? And in essence, there is no defense by Tri-State as to the claim of these plaintiffs as [11] mortgagees.

The Court: You are, in substance, saying to Mr. Davis and Mr. Menzies, "You two fight it out." You would step aside and let them fight.

Mr. Yale: In essence, I feel that that is the case, your Honor.

The Court: I think it is, except that you have no showing in the record that no money has ever been paid. But I take it that that can be stipulated to also. No one of the insurance companies has ever paid your clients a dime; is that right?

Mr. Yale: That is correct, your Honor.

Mr. Davis: Yes. However——

The Court: Is it so stipulated?

Mr. Davis: We did tender to Mr. Yale our proportion.

I am not in doubt that there has been an offer to tender. Is that not correct?

The Court: That would bear only on the question of interest, wouldn't it?

Mr. Davis: Yes, your Honor.

The Court: You couldn't wipe out your obligation by a tender.

Mr. Davis: No.

The Court: Is it stipulated that no one of the three insurance companies involved has ever paid a dime to the plaintiffs or either of them? [12]

Mr. Yale: That is correct.

The Court: Is that correct, Mr. Menzies?

Mr. Menzies: That is correct; Canadian Home have not.

The Court: Has Tri-State?

Mr. Davis: Tri-State has not, as far as I know.

The Court: I suggest that you sit down, Mr. Yale.

Mr. Yale: I am finished, your Honor. I think the matter rests in their hands.

I might say that it is primarily a dispute between the insurance companies. I have prepared a brief on the issues of law that I would like to submit rather than take the Court's time to review that orally at this time.

The Court: All right.

Mr. Yale: Thank you.

Defendant Tri-State's Argument

Mr. Davis: I don't agree with Mr. Yale that the primary dispute is between the insurance companies, because as between the plaintiffs and my clients (and I assume the same to be true as to Mr. Menzies' clients) we have admitted—it was at one time thought that Mr. Morris had acquiesced in the cancellation, but the evidence was not as strong as I thought it was, and we stipulated and admit that as far as the mortgagees only were concerned our policy was in effect at the time of the loss. It was not, we maintain, in effect as to the named assured. But since he was not made a party here and did not come in, that is immaterial any-

way. We are dealing only with the plaintiffs' rights.

Under the standard mortgage clause which is attached to all these policies, the mortgagee's rights and interests are unaffected by the rights and interests of the named assured or owner. I say in most instances. I don't want to go quite that far. But in this case it is unaffected.

I have not elaborated in my memorandum filed in October upon plaintiffs' rights or the establishment of their contract, because I thought Mr. Yale's brief was pretty good itself and contained many and ample authority.

The Court: Just a minute. See if I am right about this. You concede that Tri-State is liable, but it is your contention that there should be some apportionment of the loss between Tri-State and Canadian Home.

Mr. Davis: I concede that the Tri-State policy was in effect up to \$7,000.00 at the date of the fire as regards these two plaintiffs, yes, your Honor.

The cases hold without dispute that it is not a question of apportionment between insurance companies at all. It is a question of applying the liability of the insurance company to the assured or to the mortgagee, as the case may be, in accordance with the terms of the policy—in other words, [14] that we have to be liable beyond that proportion. Whether the other insurance is valid or not, or whether they collect it from the other makes no difference. But they cannot collect from us more than the amount that our policy bears to all other

insurance, whether valid or not or whether collected or not. That is the sole point.

Therefore, since Mr. Yale has undertaken to establish, and I think that he has amply established, that Home and Canadian policies were in full force and effect at the time of the loss, there is not much for me to say, other than to read the apportionment clause and give you one or two cases.

The Court: Was the apportionment clause in Tri-State's policy in similar language to the apportionment clause in Canadian's and in Home's policies?

Mr. Davis: I noticed the number, and they are. They are not statutory standard forms, but they are standard forms promulgated by the Rating Bureau. So they are all the same forms.

I don't think that, at this time at least, I ought to argue against Mr. Menzies' position, because he has not argued it yet.

But I say that Mr. Yale's position and his stipulation, the documentary evidence, the authorities that he has cited, with a great deal more energy than I have put in [15] because he has a very good group of authorities, all show that these two policies were in effect.

The Court: It is your contention, then, that the Home and Canadian policies should be taken into account valid or not.

Mr. Davis: Oh, yes.

The Court: Because there was what you speak of as what—existing insurance?

Mr. Davis: Yes.

The Court: What about the fact that this escrow had never closed and that Gilmore had never got title to this property and had no insurable interest? How can you say that it was a valid policy if there was no insurable interest?

Mr. Davis: But she has an insurable interest; no question about that.

The Court: What interest?

Mr. Davis: The interest is that she is a vendee in possession under contract. There can be many insurable interests, and perhaps at this time there were two insurable interests. But as to the insurable interest of Owens, who sold, and Gilmores, who bought, there is no question about that rule of law. I think Counsel cited some authorities—I didn't, because Counsel was alleging and proving that he had three policies of insurance.

But that is the rule of law, without question, that [16] a vendee under a contract in possession has an insurable interest. In fact, some states have held that he has the only insurable interest, even though he has not secured the legal title. But if the equitable and beneficial title are his, he has it all.

But in this state the courts have said several times—I couldn't put my finger on it, but I think I gave Mr. Yale some of those cases, and I think you have them here—there is no question about the mortgagees having an insurable interest. That if, under the terms of the contract, the contract is void as to the owner or the named assured, nevertheless it shall be valid in favor of the mortgagees because the mortgagees are a special class, a favored

class, because of the nature of their interest, and the insurance company may be subrogated to their rights, etc. But that is the rule, anyway. The mortgagees have an insurable interest.

The vendor has an insurable interest because he retains the legal title for the payment of his balance.

And the vendee has an insurable interest because he has paid a valuable consideration and is in possession.

The Court: Suppose that an insurance company sent a policy during escrow and said, "We enclose a policy of fire insurance which you are authorized to use and deliver, etc., as and when the escrow closes." Then what? The policy has been executed beforehand. [17]

Mr. Davis. The policy has been executed and delivered.

I would say that the policy as to the mortgagee, who did not procure the policy but for whose benefit it was procured, would be insured, even though it was left conditionally.

That is not the case here. There is no stipulation of that kind at all here.

The Court: The policy here was actually delivered to Gilmore, the buyer.

Mr. Davis: The policy here was actually delivered to Gilmore, and the certificates were eventually delivered to the plaintiffs here.

Am I right?

Mr. Yale: No. I obtained them.

Mr. Davis: Well, you obtained them. At least, the premium was paid and the policies were con-

tinued in effect. You will have to throw out the mortgagees' end of the policies or say that somebody obtained money under false pretenses, which is not the fact, as evidenced by the stipulation of facts here and the documentary evidence.

As I say, I think this is actually a problem of the plaintiffs.

I don't know what Mr. Menzies has to say about this.

The Court: Mr. Menzies. [18]

Defendant Canadian Home's Argument

Mr. Menzies: If the Court please, I believe that *Vierneisel vs. Rhode Island Insurance Company*, cited in the pretrial memorandum, answers Mr. Davis' argument. As I recall that case, the mortgagee, to wit : the plaintiff was trustee to the extent of the policy, so far as *Rose Gilmore* is concerned.

But we are not concerned with that problem. We are concerned, as the Court pointed out, with an insurable interest in this respect; that the policy does not insure the individual, but it insures the property. Before the individual can collect under the policy, he must own that property or have such insurable interest, an interest that is tantamount to an ownership. In this instance, the escrow is still open.

The Court: The interests of the trust deed holders would be recognized both before the escrow closed and afterward—they had an interest in the property, and I take it from the escrow instructions that the owner was conveying his equity. The new

owner, Gilmore, would be taking subject to these trust deeds. So the holders of the trust deed have an interest in the property all the way along.

Mr. Menzies: But not under these particular policies, until title passed.

The Court: I understand that you collected a [19] premium and then rebated part of it.

Mr. Menzies: We collected a premium, and for the time that the policies were in force and effect.

The Court: That was from a time prior to the fire?

Mr. Menzies: That was prior to the fire.

The Court: And then part of that time was before the escrow closed.

Mr. Menzies: The escrow never closed.

The Court: Well, then, how can you collect a premium from these people on the theory that some insurance was in effect and the next minute say that there is no insurance in effect?

Mr. Menzies: For this reason, that the events that occurred were not brought to the company's attention until after the fire, and as soon as they were brought to the attention of the company they cancelled. Now they have a right to their unearned premium for the time that the policy was out. They have no way of knowing what the hazard is until it is brought to their attention. If you buy a policy, and then you change your mind and you want another policy and you cancel it, surely the company is entitled to a premium for that contingent exposure.

The Court: I agree, if there was an exposure.

But you contend that there was no exposure until after this escrow closes. [20]

Mr. Menzies: That is right, because Mrs. Gilmore had no title to that property. It was a pure contingency. It was contingent upon her meeting the requirements of the escrow and completing them, and to this day it has not been completed.

You may be named in a policy, but until there is some consideration passing—and none has passed so far as the record in this case is concerned, between the mortgagee and Mrs. Gilmore—there could not possibly be a contract.

The Court: I don't follow you on that. Gilmore has paid you a premium for a certain period of time. You never would have got a premium from the holders of the first deed of trust. They didn't owe you any money.

Mr. Menzies: No.

The Court: Gilmore was contracting for their benefit.

Nor would Gilmore have ever collected from the holders of the first deed of trust any part of her insurance premium. She couldn't go to them. There would be no consideration that passed between the first and second trust deed holders and the owner. She couldn't go around and say, "I have taken out some insurance. It is going to protect you. I want you to pay a part of the premium." They never pay any part of it. The only person who ever pays it is the record owner. Gilmore never became the record owner, but you took money from her; and

you say that you are entitled to take the [21] money because you had the risk. What was the risk?

Mr. Menzies: We had no way of knowing until after the fire occurred. We assumed, of course, that the escrow would go through, and if that were true then the Tri-State would be off the loss and the Canadian and Home were on it. It was a contingency there. Until that happens, Gilmore had merely a contingency or a contingent interest subject to the closing of escrow and the meeting of the requirements of that contract.

The Court: Wouldn't it have been the customary thing to do to have the insurance companies send their policies in, to be effective and to be delivered only upon close of escrow?

Mr. Menzies: No.

The Court: It would not.

Mr. Menzies: The only one that would be handled that way, your Honor, would be the one which the mortgagees held and which the seller held. That would be deposited to be prorated as of the close of escrow. And if you notice, in those escrow instructions, as I recall them, there is not any provision for that, and the escrow did not close. And under the Vierneisel case these plaintiffs held the proceeds of the Tri-State policy as trustee for Mrs. Gilmore in the event that title passes. Or they could have assigned it to her, under that case, or the proceeds of it, and she could have proceeded.

I think we have covered that situation in the [22] Holman case, which is cited in our briefs.

In California delivery of an instrument in es-

crow conveys no title land. Occupancy of the land while awaiting delivery of instruments in escrow does not give rise to any interest independent of the conditions of the escrow or contrary to it. The purchaser has no duties or liabilities growing out of an ownership interest in the land. All such liabilities remain in the vendor holding the title in ownership with its accompanying liabilities and burdens. That is the Chrisman case, at 35 Fed. Sup.

It is also required that this insurable interest exist when the insurance takes effect and when the loss occurs. That is the California Insurance Code, Section 286.

The Court: There is no question about that. But Gilmore is not suing here. The only question on that point of law is whether the trust deed holders had an insurable interest.

Mr. Menzies: They have none in that policy. It is contingent on passage of title. They obtain no better interest—

The Court: By the language of the policy?

Mr. Menzies: The policy names them as a mortgagee. But before they can get as a mortgagee of Rose Gilmore, there must be a mortgage in their favor.

The Court: Now wait. The policy, you say, names [23] them as mortgagees, which would be broad enough to cover the holders of trust deeds. They are mortgagees, regardless of whatever happens to Gilmore. I haven't seen those escrow instructions here, but there was no provision in the escrow that these obligations were to be refinanced,

was there? The Owenses were merely selling their equity to Rose Gilmore. The trust deed holders stayed right in place.

Mr. Menzies: That is right, sir.

The Court: Then where is there any contingency? They are mortgagees or trust deed holders at all times—before the escrow closes, after the escrow closes.

Mr. Menzies: That is true. But they still don't come within the provisions of the contingency to these policies according to the escrow, as I remember it.

The Court: What is the particular language upon which you rely? Let me see it.

Mr. Menzies: I think it is down at the bottom of that page.

The Court: I thought this was going to be a simple little matter, because this escrow never closed. But maybe not.

Mr. Davis: A conditional sales contract may run for years and years and never close so that the legal title is handed over to the purchaser. I don't know that it makes any difference. [24]

Mr. Menzies: They are to obtain a policy (indicating to the Court).

The Court: I am talking about the terms of your policy. You are relying upon some term of your policy?

Mr. Menzies: Our policy is the standard policy, but it is contingent upon the assured obtaining title to the property.

The Court: Where does it say that in your policy?

Mr. Menzies: It doesn't say that, your Honor. But that is what the Insurance Code says.

The Court: I don't think it says what you say it says. I don't see what you are talking about in here. Where does it say anything about——

Mr. Menzies: Secure policies, there at the bottom.

The Court: This part is signed by Owens, the seller. It says, "You will (talking to the Escrow), as my agent, assign any fire insurance and other insurance of mine handed you or that Beneficiaries inform you they hold. I agree to pay for policy of title insurance, assignments on fire insurance policies, obtaining Offset Statements, * * *" That is all it says.

Mr. Menzies: Let's see if that is the same as my copy here.

"Premium on fire and other insurance handed you or that Beneficiaries inform you they hold None * * *" [25]

I think that is signed by Mrs. Gilmore.

The Court: "Premium on fire and other insurance handed you or that Beneficiaries inform you they hold to none * * *" I read that as part of the beginning of that paragraph. It starts up there, "The following prorates and adjustments are to be made in this escrow: * * *" These are typical things that are prorated in escrow. First, they talk about interest, then they talk about taxes, then they talk about rents, and under rents they say "none."

When they talk about premiums on fire insurance they say "none." That is all I get out of that. There is to be no prorated fire insurance.

Mr. Menzies: That, of course, means this, as I view it: that Mrs. Gilmore was not to prorate the existing Tri-State and that her policy would not take effect until the close of escrow.

The Court: Well, that is what you would ordinarily think an insurance company would do. But let me give you just a practical illustration of how this thing works.

I bought a house down here and I bought a 4-flat, and one was to close about December 26 last year and the other was to close about January 3. I couldn't be sure when they would close. My son-in-law sells insurance. So I said, "Cancel out your insurance. I'll buy some new insurance." I told the Escrow there would be no prorated of the insurance; I would buy some new insurance. How could I tell when the [26] escrow was going to close? And so without thinking about this—no harm occurred, but I can see that there might be serious problems—I told them to write one policy effective about December 23 or 24, and to write the other policy effective January 1, 1958, and send them down to the escrow. He sent them down. And the owners, who sold, will get a rebate on the insurance that they had.

These policies weren't delivered to be effective upon close of escrow. And I remember thinking about it now. The thought went through my head, how can I tell them exactly when the escrow will

close? They can't write a policy without a beginning date on it. It has to have a beginning date. Therefore, I just assumed that I would have to guess as close as I could and have them send the policies in.

Mr. Menzies: I have a similar situation now where a house under construction is being purchased and insurance has been ordered by the purchaser because of this case, and it takes care of that purchaser's interest in the property. There is no mortgage involved in this transaction, but I felt that that was the safer way of doing it. The premium on the policy for the few days in escrow is not very material, in the event you have a loss.

I assume that this contract in this case is enforceable for specific performance. Under the *Vierneisel* case, the plaintiffs here hold that money in trust for the purchaser, [27] and if the purchaser does not feel that they are protected they may take whatever policy they see fit. In this instance Mrs. Gilmore has the interest that Mr. Davis has pointed out. But the mortgagees don't have an interest in her policy because it is merely a contingency of title passing before her rights vest.

The Court: That is true; Gilmore's title is contingent. But there is nothing contingent about these trust deed holders. They have part of the title right now, and have had it all along, before the fire and after the fire. That is where I don't get your point. Unless your contention is that Gilmore had to have an insurable interest before the trust deed holders had an insurable interest, and since she never got

title then the policy was never effective as to the trust deed holders. Is that your point?

Mr. Menzies: Yes. Furthermore, that there was no consideration as between the mortgagees here and Gilmore or the companies. The plaintiffs here were mortgagees to the purchaser.

The Court: Where would there ever be any consideration? The mortgagees never pay any part of this premium. They never pay the owner any part of it. It is really a contract for the benefit of a third party, as far as they are concerned. They sit back. It is true that they may have an agreement in their trust deed that the owner will keep the property [28] insured. But they don't pay any money. No money consideration passes.

Mr. Menzies: Well, yes, there may not be a money consideration, if you put it that way. But they do have an interest in the property to the extent of the mortgage. But before they may take the benefit, as I read the Insurance Code, there has got to be some assumption of that mortgage by the named assured. They are merely contingent beneficiaries in this policy. They don't have a vested right there. There is no greater right than that of the named assured. I think that is where the situation arises. It is only in the event that the named assured takes title.

The Court: In going over this stipulation, my visceral reaction was that there couldn't be any liability on Home and Canadian. But you are not giving me a lot of help on it. It seemed to me that where people put policies into an escrow and the

escrow didn't close, the outfit that had the insurance beforehand ought to bear the loss. But Mr. Davis now represents that there is authority that if the policies were actually executed, whether valid or not they must be taken into account. And you haven't given me much to hang my hat on here.

Mr. Menzies: I can understand that. Maybe I can clear that up, your Honor. Every policy has that "valid and collectible or not" coverage. That means only this: Whether [29] valid or not, Tri-State is entitled to an apportionment of the insurance as the total amount of insurance bears to their proportion of the coverage.

But that would not apply here, because title did not pass to this property. These mortgagees did not order the policy. Tri-State was getting off the risk upon the closing of escrow and Canadian and Home were going on. That was a contingency. That was the understanding of the parties.

The Court: If the facts had shown that the policies went into the escrow but were to become effective as of the close of escrow, I could follow that. But apparently you collected premium on this policy from the time it was issued.

Mr. Menzies: That is true. But we are entitled to do that. If we don't do that, we have to account to the Insurance Commissioner for it. The minute that that policy goes into the hands of an assured or an escrow, the premium starts running from the date of the policy, and it continues for the term of the policy unless cancelled (1) by the company or (2) by the named assured.

Now these policies only make the plaintiffs here contingent beneficiaries. The named assured in this policy is Gilmore, and until Gilmore gets title to that property the policy would not be valid. That is why they cancelled off the minute that the situation was called to their attention, that [30] here is a matter in escrow—no title has passed.

The Court: As I say, my offhand reaction is that you are right. But you haven't given me much help to answer the arguments of Mr. Yale and Mr. Davis.

Mr. Menzies: I think I have answered them here, as far as I am able to do so, in the Holman case and in the Vierneisel case.

Further, of course, there are the additional points of the statute of limitations that would apply. We raise them in our Answer, and I don't believe that Tri-State did. And then there would have to be delivery to the mortgagees, plaintiffs herein, before the policy was good.

The Court: There would never be any delivery to the mortgagees in the ordinary case, would there?

Mr. Menzies: Yes, in every instance the original policy, or a copy thereof, is sent to the mortgagee.

The Court: The first lienholder would probably get the original, and the owner would get merely a copy or a notice of insurance. What would the second lienholder get? He wouldn't get the original.

Mr. Menzies: If it covered his interest, he would get a copy—if that was shown on the policy, and upon passage of title he would get out of his escrow.

The Court: If these people are the equivalent of

third party beneficiaries under a contract, there doesn't have [31] to be any delivery of the contract to them.

I could contract with you to do something for Mr. Yale. It is a valid contract that Mr. Yale might enforce even though he didn't get delivery of it. Third party beneficiary contracts don't have to be delivered.

Mr. Menzies: That is true, I think, in every instance but in an instance like this, for this reason: that before a policy may be issued to the purchaser and have effect, the purchaser must have title to that property. Here you had a contingency. As an exception, of course, you do have certain situations, as where a tenant may insure his interest in the property. But here you don't have that situation. You have a contingency of title passing to the named assured.

The Court: Well, I am going to read over your briefs and if I want some more help I am going to ask you to write another brief.

I want to hear from Mr. Davis on this matter of the statute of limitations, set forth in the Answers of Canadian and Home.

Mr. Davis: Again, your Honor please, I think that is Mr. Yale's job, because as I have shown in my brief we are not concerned with defenses. If there is other insurance, then we apportion. Now the fact that he has presented the defense of the statute of limitations, or defenses of other sorts—he might present even a defense of arson, as far as [32]

that goes—as long as the policies were not void ab initio, then they apportion.

However, I will answer. Mr. Yale has the authority.

You cite an Oklahoma authority. I gave you one.

The Court: You are going to rely on the authorities of Mr. Yale on this matter of the statute of limitations?

Mr. Davis: I have given him some authorities.

These policies are statutory policies, as provided by the Insurance Code.

We don't have a case precisely in point in California on the question which Mr. Menzies has raised.

The fire was on September 27, and the suit was filed on September 27. This Oklahoma case, which I think Mr. Yale has in his brief——

Mr. Yale: New York case.

Mr. Davis: There is an Oklahoma case that said that the policy is a statutory policy, the limitation is a statutory limitation, and the statutory methods of determining that limitation must be used and applied. We have our rule excluding the first and including the last. Mr. Yale has brought his action within time.

As I say, that is not my part of the case at all, because if he had a policy at all it wouldn't make any difference to this so-called apportionment whether he didn't prosecute his action where he didn't have a defense. [33]

If your Honor wants me to answer Mr. Menzies, Mr. Menzies keeps saying that they must have the

title. That is not the law, and it would be a monstrous situation if it were the law. That anybody who buys a piece of property on conditional sale and doesn't get the deed, doesn't have title and couldn't get insurance.

I think there has been no insurance case that has interpreted this—in fact, I don't think there is any interpretation at all. Section 1662 of the Civil Code, which is the Uniform Vendor and Purchaser Risk Act, provides—the apportionment is applicable here:

“Any contract * * * for the purchase and sale of real property shall be interpreted as including an agreement that the parties shall have the following rights * * * unless the contract expressly provides otherwise:

* * *

“(b) If, when either the legal title or the possession of the subject matter of the contract has been transferred, all or any part thereof is destroyed without fault of the vendor or is taken by eminent domain, the purchaser is not thereby relieved from a duty to pay the price, nor is he entitled to recover any portion thereof that he has paid.” [34]

Section 1742 of the Civil Code, in effect, has that same provision with reference to personal property.

Now for many years we had in California a rule that the vendor having entered into a contract and put the vendee in possession was not the sole and unconditional owner, and that is what Mr. Menzies is confusing here. He doesn't read his cases.

In our former California standard policy, we also

had a provision that this entire policy shall be void if the insured is not the sole and unconditional owner of the property. That provision was taken out when the new standard policy was adopted about ten years ago.

Under the Vierneisel case the defense was sought to be made that it was not the sole and unconditional owner.

But we are no longer concerned, under our standard policy, with the sole and unconditional ownership. Our policies now insure to the extent of the insured's interest. It may be little or it may be less. He may be the vendee in possession, he may be a vendor out of possession, he may be a mortgagee or a mortgagor. But the policy insures John Smith to the extent of his interest. Your mortgage clause goes still further. That provides that the rights of the mortgagee shall not be affected by any act or neglect of the assured.

To simplify it again. Here is Rose Gilmore, a [35] purchaser under contract in possession, as is shown by the escrow agreement and by the very stipulation on which we are arguing this case. Rose Gilmore procured, for her own benefit and for the benefit of these two mortgagees, two policies of insurance. She pays the full premium, a valuable consideration, and the company accepts it, and the contract has no ambiguity in it. These two policies are on. If they are on, then the question of the proportionate liability is simply a mathematical matter.

Mr. Menzies speaks of having to have the title. But the Code doesn't. The Code states:

“Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest.”

So Rose Gilmore had an insurable interest.

The Court: She is not even a party.

Mr. Davis: No, it is not for us to weigh the extent of her interest. We know what the mortgagees stipulated. They had the full insurable interest.

The Court: I am going to mark the matter submitted, and if I am not satisfied with your briefs I am going to ask you to write some new ones.

Mr. Davis: I will confess that I didn't write much [36] of a brief. I made just the one point.

The Court: I have a note here that you are relying on Mr. Yale's brief, which you compliment highly.

Mr. Davis: I suggested some cases to him and let him do the work. I have gone through this many times, and I get rather excited when I hear somebody make statements of law such as have been made here today.

The Court: Mr. Yale.

Mr. Yale: If the Court please, I have not covered the matter whether we would be entitled to interest on the judgment. Would the Court prefer that that be submitted in the form of a letter, with authorities?

The Court: Don't make it a letter. Submit me a memorandum on interest.

Mr. Yale: I have just one authority.

The Court: If it is just one authority, I'll write it down.

Mr. Yale: Chase vs. National Indemnity Company, 129 Cal. Ap. (2nd) 853.

The Court: In point?

Mr. Yale: In point.

That case interprets Section 3287 of the Civil Code.

Subhead (21) in that case, incidentally, is the important point.

The Court: Submitted.

[Endorsed]: Filed October 9, 1958. [37]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 79, inclusive, containing the original:

Petition for Removal from State Court, etc., containing copy of Complaint, Summons, etc.

Answer of Defendant, The Canadian Fire Ins. Co.

Answer of Defendant, Tri-State Mutual Grain Dealers Fire Ins. Co.

Amendment to Answer of Defendant, Tri-State Grain Dealers Fire Ins. Co.

Answer of Defendant, The Home Insurance Co.
Amended Pretrial Stipulation.

Memorandum of Court.

Findings of Fact, Conclusions of Law and Judgment.

Minute Order, 7/28/58.

Notice of Appeal (Tri-State Mutual Grain Dealers Fire Ins. Co.).

Bond on Appeal (copy), Tri-State Mutual Grain Dealers Fire Ins. Co.

Designation of Record on Appeal (Tri-State).

Statement of Appellant's Points on Appeal.

Cross-Appeal by C. R. Morris & Constance B. Honaker.

Bond on Appeal (copy) , C. R. Morris, et al.

Designation of Record on Appeal (Cross-Appellants).

Statement of Cross-Appellants' Points on Appeal.

B. Plaintiff's Exhibits A to J, inclusive.

C. One volume of Reporter's Official Transcript of Proceedings had on: February 3, 1958.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Dated: October 17, 1958.

JOHN A. CHILDRESS,
Clerk.

[Seal] By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16226. United States Court of Appeals for the Ninth Circuit. Tri-State Mutual Grain Dealers Fire Insurance Company, Appellant, vs. C. R. Morris, Constance B. Honaker, The Home Insurance Company and The Canadian Fire Insurance Company, Appellees. C. R. Morris and Constance B. Honaker, Appellants, vs. The Home Insurance Company and The Canadian Fire Insurance Company, Appellees. Transcript of Record. Appeals From the United States District Court for the Southern District of California, Southern Division.

Filed: October 18, 1958.

Docketed: October 22, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

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No. 16226.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TRI-STATE MUTUAL GRAIN DEALERS FIRE INSURANCE COMPANY,

Appellant,

vs.

C. R. MORRIS, CONSTANCE B. HONAKER, THE HOME INSURANCE COMPANY and THE CANADIAN FIRE INSURANCE COMPANY,

Appellees.

C. R. MORRIS and CONSTANCE B. HONAKER,

Cross-Appellants,

vs.

THE HOME INSURANCE COMPANY and THE CANADIAN FIRE INSURANCE COMPANY,

Appellees.

Opening Brief of Appellant, Tri-State Mutual Grain Dealers Fire Insurance Company.

Introductory Statement.

This is an appeal by Appellant, Tri-State Mutual Grain Dealers Fire Insurance Company from a judgment entered in the United States District Court, Southern District of California, Southern Division, against it and in favor of plaintiff, C. R. Morris and Constance B. Honaker (now Appellants and Appellees). [Tr. 47, 59.] Plaintiffs C. R. Morris and Constance B. Honaker (now Appellants) also appeal from that portion of said judgment in favor of Appellees, The Home Insurance Company and the Canadian Fire Insurance Company, and against them and each of them.

Statement of Jurisdictional Facts.

Plaintiffs C. R. Morris and Constance B. Honaker on November 23, 1956, commenced joint action against this Appellant and the Appellees, The Home Insurance Company and The Canadian Fire Insurance Company, by filing complaint in the Superior Court of the State of California, in and for the County of San Diego. Appellee, The Canadian Fire Insurance Company, appeared in the District Court of the United States, Southern District of California, Central Division by petition for removal. It appears from the petition and plaintiff's complaint that both plaintiffs were citizens and residents of the State of California and that all of the defendants were citizens of other states, this Appellant being a citizen and resident of the State of Minnesota and the defendant, Appellee, the Home Insurance Company, a citizen and resident of the State of New York and defendant, Appellee, The Canadian Fire Insurance Company, a citizen and resident of the Dominion of Canada, and that the amount in controversy, exclusive of interests and costs, exceeded the sum or value of \$3,000.00. [Tr. 3-5, 6-11, 48.]

All parties appeared in the District Court without objection and the Court had jurisdiction. (28 USCA 1332 (a), 1441, 1446.)

This Court has appellate jurisdiction to review the judgment herein. (28 USCA 1291, 1294.)

Statement of the Case.

This case was tried entirely upon the pleadings, consisting of plaintiffs' complaint [Tr. 6], answer of Appellee, The Canadian Fire Insurance Company [Tr. 11], answer of Appellee, The Home Insurance Company [Tr. 24], and answer of this Appellant, Tri-State Mutual Grain

Dealers Fire Insurance Company, as amended [Tr. 19, 39], and upon amended pre-trial stipulation [Tr. 32-38], and upon oral stipulations and stipulated exhibits at the trial [Tr. 68-76], which conclusively show:

That on the 27th day of September, 1955, a building located upon real property described as the north 140' of Riverview Farms in the County of San Diego was damaged by fire and that the loss to said property by said fire was in the sum of \$7,890.00. [Tr. 32-35, 48.]

At the time of the loss by fire the property was in possession of Rose W. Gilmore as purchaser from Aubrey L. Owens and Emil T. Owens under a pending escrow agreement that had not been closed and deed from Owens to Gilmore had not been delivered. [Tr. 32-48, Pltf. Ex. I.]

At the time of the fire the property was encumbered by a first and second deed of trust, the plaintiff C. R. Morris being the beneficiary of the first deed of trust and plaintiff Constance Honaker being the beneficiary of the second deed of trust. [Pltf. Exs, A, B.] Both deeds of trust were executed and recorded prior to the agreement to purchase by the said Rose Gilmore. [Tr. 34.]

Prior to the loss by fire and prior to the purchase agreement and possession of Rose W. Gilmore this Appellant had executed and delivered to Aubrey L. Owens and Emil T. Owens its Standard Fire Insurance policy, insuring them against loss by fire to the property in question to the amount not exceeding \$7,000.00. [Tr. 71, Pltf. Ex. C.]

Attached to and a part of said policy was a "MORTGAGEE CLAUSE WITHOUT FULL CONTRIBUTION" which provided that, subject to the terms set forth under said rider, loss under the policy, on buildings only, should be payable first to plaintiff, C. R. Morris, and secondly to plaintiff, Con-

stance B. Honaker, as their interests may appear. The clause provided that the term "mortgagee" included deeds of trust and interests therein. Said mortgage clause further provided *in haec verba* as follows:

"This insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the described property, nor by the use of the premises for purposes more hazardous than are permitted by this policy.

* * *

"This company shall not be liable to the mortgagee for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, under policies issued to, held by, or payable to the mortgagee, whether collectible or not."

The Standard Policy provisions contained in the policy and above referred to are as follows:

"This company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not."

Appellant, Tri-State, admitted that as to the interests of the mortgagees, Morris and Honaker only, that its policy was in full force and effect at the time of the fire.

Prior to the fire, Appellees, The Home Insurance Company and The Canadian Fire Insurance Company had each executed and delivered to Rose W. Gilmore, their respective policies of insurance, insuring said Rose W. Gilmore by their separate policies, each in an amount not

to exceed \$5,000.00 against loss by fire to the building in question. These policies were Standard Fire Policies and each contained a mortgage clause identical with the one on the Tri-State policy as summarized above, making loss payable first to plaintiff, Morris, and secondly to plaintiff, Honaker, as their interests may appear. [Tr. 50-52, Pltf. Exs. D, E.]

These policies were delivered to Rose W. Gilmore prior to the fire, and each defendant collected and received from Rose W. Gilmore a premium for their respective insurance policies, and retained the same until March 5, 1956, and after they had received notice of the loss when they each sent cancellation notices to Rose W. Gilmore, but each retained the premium earned on their respective policies to the date of cancellation. [Tr. 51, 52; Pltf. Exs. F, G, H.]

Plaintiffs Morris and Honaker, maintaining that all three of the policies were in effect as to them under the provisions of the aforesaid mortgage clause, brought their action against all three of the insurance companies. The named insureds, Owens and wife in the Tri-State policy, and Rose W. Gilmore in the Home and Canadian policies were not parties to the suit.

Appellant Tri-State admitted that, under the special provisions of the mortgage clause, its policy was in effect as to the plaintiffs at the time of the fire, but contended that its liability was limited by the terms of the policy and this clause to that proportion of the loss which the amount of its policy bore to all insurance covering said property,

that is, that proportion of the loss which its policy of \$7,000.00 bore to the total of all three policies, or \$17,000.00, or 7/17ths of the loss.

Appellees, Home and the Canadian, claimed in effect that their policies were void *ab initio*, contending that Rose Gilmore had no insurable interest in the property at the time of the fire. Said Appellees raised several other defenses relating to conditions subsequent which we do not believe are material in our brief.

Specification of Errors.

1. The trial court erred in entering judgment against this Appellant in the amount of said judgment and in not limiting this Appellant's liability and the judgment against it to its proportion of the loss as provided for in the policy and mortgage clause.

2. The court erred in its conclusion of law No. 2 in concluding that at the date of the fire loss Aubrey L. Owens and Emil T. Owens had the only insurable interest in the property involved and that Rose Gilmore had no insurable interest therein.

3. The court erred in making its conclusion of law No. 4 to the effect that the policies of the Home Company and the Canadian Company were not to become effective until the escrow closed for the reason that there is not an iota of fact either in the stipulations or the findings to support said conclusion.

ARGUMENT.

Synopsis.

(a) Rose Gilmore clearly had an insurable interest at the time of the fire.

(b) Plaintiffs Morris and Honaker, as beneficiaries of their respective trust deeds, had an insurable interest.

(c) The court erred in making its conclusion of law No. 4.

(d) This Appellant's liability.

This appeal is predicated upon the single question of whether or not this Appellant was entitled to have its liability limited to that proportion of the loss that the amount of its policy bore to the total insurance on the property payable to the trust deed beneficiaries, and all of the foregoing specifications of error apply to this one proposition.

It would seem that if plain and unambiguous language of a contract is to be given any effect, and if the statutes and established law are followed, there can be but one conclusion and that is that the trial court erred in this respect.

It seems clear that if the policies of insurance executed and delivered for a valuable consideration to Rose Gilmore with loss payable to the plaintiffs herein were valid and subsisting insurances at the time of the fire that the answer is yes, the court erred. All three of the policies were practically identical in form with the identical terms and conditions as related to the plaintiffs

herein. No one could suggest any ambiguity in the clear language of the pro rata provision of the mortgagee clause, "that the company shall not be liable to the mortgagee for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property under policies issued to, held by, or payable to the mortgagee, whether collectible or not." It therefore follows that if there was other insurance issued to, held by or payable to the mortgagee that the trial court erred in not limiting Appellant's liability to the proper pro rata.

It is clearly apparent that the trial court's error stems entirely from his conclusion that Rose Gilmore had no insurable interest in the property involved at the time of the fire, and therefore that the policies of the Home and the Canadian were void *ab initio*.

This conclusion, in the face of definite stipulation of facts, was clearly erroneous and contrary to the settled law in California and this district.

(a) Rose Gilmore Clearly Had an Insurance Interest at the Time of the Fire.

Under the stipulations and findings Rose Gilmore was in possession of said premises as a purchaser under a pending escrow agreement and had paid a valuable consideration and had procured insurance in her name with loss payable to the plaintiffs which insurance was effective September 20, 1956, the fire occurring September 27, 1956.

She had paid a premium for these policies and they were in her possession at the time of the fire. Plaintiffs were beneficiaries under valid and subsisting deeds of trust at the time of the fire.

The nature and extent of the interest of a purchaser in possession under a contract for the purchase and sale of real property has in the past been the subject of many decisions both in this jurisdiction and elsewhere, but it seems that the matter has been entirely set at rest and epitomized in Section 1662 of the Civil Code of California, Uniform Vendor and Purchaser Risk Act, enacted in 1947.

This act provides in part, as follows:

“Any contract hereafter made in this State for the purchase and sale of real property shall be interpreted as including an agreement that the parties shall have the following rights and duties, unless the contract expressly provides otherwise:

“* * * (b) If, when either the legal title or the possession of the subject matter of the contract has been transferred, all or any part thereof is destroyed without fault of the vendor or is taken by eminent domain, the purchaser is not thereby relieved from a duty to pay the price, nor is he entitled to recover any portion thereof that he has paid. * * *”

This Code section, being of recent enactment, has not been cited, except in one case, that of *Ward v. Union Bond and Trust Company*, 243 F. 2d 476, decided by this court on April, 1957, where the court said (footnote 3): “California Civil Code, Sec. 1662, the Uniform Vendor and Purchaser Risk Act, puts the risk of loss on the purchaser if either the title or the possession has been transferred.”

In the present case, the possession had been transferred and Gilmore was in possession as a purchaser.

With the clear and unequivocal language of the Code and this court's interpretation as above quoted, it would seem unnecessary to quote from the various decisions both in this jurisdiction and elsewhere, all holding insurance cases that the purchaser in possession has an insurable interest, some even holding that he is, for insurance purposes, the sole and unconditional owner, and we will not quote from other decisions, but for the purpose of the record, cite a few:

See:

Estate of Reid, 26 Cal. App. 2d 362, 79 P. 2d 471;
Hartford Fire Ins. Co. v. Cagle, 249 F. 2d 241;
Central Manufacturers Mutual Ins. Co. v. Jim Dandy Markets, Inc. 77 Fed. Supp. 171 (S. D. Cal.), affirmed 172 F. 2d 616 (9th Cir.).

It should go without saying that if the risk of loss to the property falls upon the purchaser that the purchaser has an insurable interest. It would serve no purpose to cite any of the innumerable cases since the beginning of insurance law, defining and applying insurable interest as California statutory law has completely spelled out the rule relating thereto.

Sections 281 and 282 of *California Insurance Code* provide as follows:

“281. Every interest in property, or any relation thereto or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest.

“282. An insurable interest in property may consist in:

1. An existing interest;

2. An inchoate interest founded on an existing interest;
- or,
3. An expectancy, coupled with an existing interest in that out of which the expectancy arises."

The trial court clearly erred in holding that Rose W. Gilmore had no insurable interest in the property at the time of the fire.

We believe the trial court's error arose entirely from his failure to recognize the difference between an insurable interest that is sole and unconditional and an interest that is not sole and unconditional, and his misconception of the holding in the case of *Vierneisel v. Rhode Island Insurance Company*, 77 Cal. App. 2d 229, 175 P. 2d 63. This appears clear from the trial court's memorandum opinion. [Tr. 42.]

In the *Vierneisel* case no point whatsoever was involved as to the insurable interest of the purchaser in possession under a contract, as the case makes it clear that at the time of the fire the purchaser had taken no steps nor performed any act creating an interest in the property in him. On the day before the fire, the owner had executed written escrow instructions and placed them with the policy in the hands of the escrow holder. The purchaser had taken no steps and took none until several months after the fire toward accepting the proposal of the seller.

There was no discussion whatsoever of a purchaser in possession in this case, the sole question being whether the owners were the sole and unconditional owners at the time of the fire.

This case has been considered and distinguished by this court in the case of *Central Manufacturers Mutual Ins. Co. v. Jim Dandy Markets, Inc.*, cited *supra*, wherein Judge Yankwich, at page 173 of 77 Fed. Supp. in holding that the vendee in possession has an insurable interest in the property has this to say about the *Vierneisel* case:

“Under California law, the vendee under a conditional sales contract has an insurable interest, as the sole owner of the property. *Kaufman v. All Persons, etc.*, 1911, 16 Cal. App. 388, 117 P. 586; *Kavanaugh v. Franklin Fire Ins. Co.*, 1921, 185 Cal. 307, 311, 312, 197 P. 99. Such title is not, in any way affected by the fact that the assignment is executory, so far as the vendee is concerned, and is dependent for full execution upon the performance by it of certain condition precedent, i.e., the payment of the full purchase price. For this reason, cases like *Vierneisel v. Rhode Island Insurance Company*, 1946, 77 Cal. App. 2d 229, 175 P. 2d 63, relied on by the plaintiffs do not apply. There, the court was dealing with an outright sale of real property which was not to become effective until the deed had actually been delivered. When this is the case, delivery into escrow does not pass title and any loss by fire is payable to the owner who remains, until the delivery of the deed, the sole owner of the property. Here the vendee was in possession and all that remained to be done by him was the payment of the price.”

This court, in affirming Judge Yankwich's decision in 172 F. 2d 616, at page 618, said:

“In California, *Jim Dandy Markets*, as conditional vendee in possession of personalty, had an insurable interest as the sole owner of the property within the meaning of the policies issued by Cen-

tral and Indiana. *Savage v. Norwich Union Fire Insurance Society*, 125 Cal. App. 330, 13 P. 2d 955; *Votaw v. Farmers Automobile Inter-Insurance Exchange*, Cal. Sup., 85 P. 2d 872. The vendee bears the risk of loss and is entitled to recover on his policies with appellant insurance companies.”

(b) Plaintiffs Morris and Honaker, as Beneficiaries of Their Respective Trust Deeds, Had an Insurable Interest.

Perhaps we have permitted ourselves to become unduly diverted from the fundamental issue in this case, because of the trial court’s basing its decision on the question of whether Rose W. Gilmore had an insurable interest. Although we believe we have amply demonstrated that she did have a substantial insurable interest, in the property at the time of the fire, this perhaps is not too important after all.

After all, the real point in issue was whether or not the plaintiffs had insurance other than that of this Appellant under policies issued to, held by or payable to them whether collectible or not.

Clearly no contention can be made that they did not have an insurable interest which consisted of the right to protect themselves by insurance against the loss of the security provided by their trust deeds.

The mortgage clause attached to all of the policies contains special provisions relating to mortgagee only, providing, among other things that the insurance as to the interest of the mortgagees should not be invalidated by any act or neglect of the mortgagor or owner and, provided that in case the owner should fail to pay the premium, the mortgagee agreed to pay the same on demand.

We have a situation here where Rose W. Gilmore, the purchaser in possession under the escrow contract, had procured insurance effective prior to the date of the fire for her benefit and for the benefit of the plaintiffs. She had paid for this insurance and received and had in her possession the policies of the Appellees, The Home and The Canadian, and there had been no repudiation of these insurance contracts prior to the fire by anyone and in fact, the said Appellees permitted the policies to run for many months after the fire and upon cancellation retained the premium earned from the inception date of the policy to the date of the cancellation.

That the plaintiffs did not receive delivery of the policies prior to the fire is immaterial. Rose Gilmore had entered into contract with these insurance companies for their benefit. This court in the case of *Tarleton c. De Veuve*, 113 F. 2d 297, opinion by Judge Garrecht, in speaking of a similar situation, said:

“We now examine the rights of the mortgagee, appellant Tarleton, under this policy. That appellant Tarleton was unaware of the existence of the insurance is of no import. To enable a mortgagee named in a mortgage clause to enforce a policy it is not essential that he had knowledge of its existence before loss. *Union Institution for Savings v. Phoenix Ins. Co.*, 196 Mass. 230, 81 N. E. 994, 995, 14 L. R. A., N.S., 459, 13 Ann. Cas. 433; *Federal Land Bank v. Atlas Assur. Co.*, 188 N. C. 747, 125 S. E. 631. Nor was acceptance of the policy required by the mortgagee to complete the contract. *Federal Land Bank v. Atlas Assur. Co. supra.*”

The trust deed beneficiaries, the plaintiffs, had separate and distinct insurable interests in the property which they could insure unaffected by the rights of either the buyer or the seller. This court said in *Tarleton v. De Veuve*, *supra*:

“The viewpoint of the majority of the courts is contrary to the contention of the appellees that the rights of a mortgagee under a ‘standard’ or ‘union’ mortgage clause are merely those of a third party beneficiary. With but few exceptions, the courts are in agreement that where the interest of a mortgagee is protected by a standard or union mortgage clause, there exists an independent contract between the mortgagee and the insurer, and the mortgagee’s rights under the mortgage clause cannot be invalidated by any act or neglect of the mortgagor or owner.

“In *New York Underwriters Ins. Co. v. Central Union Bank*, 4 cir., 65 F. 2d 738, 739 (certiorari denied, 290 U. S. 679, 54 S. Ct. 102, 78 L. Ed. 585), the court had this to say: ‘The mortgage clause protects the mortgagee against any act or neglect of the mortgagor, whether prior or subsequent to its execution.’ *Syndicate Ins. Co. v. Bohn* (C. C. A. 8th) 65 F. 165, 27 L. R. A. 614.

“In *Witherow v. United American Ins. Co.*, 101 Cal. App. 334, 340, 281 P. 668, 671, a case in which there was involved a mortgage clause containing a provision excepting the mortgagee’s interest from being affected by any act or neglect of the mortgagor, the following language was used by the court:

“Where an insurance policy is written in favor of an insured and has attached to it a mortgage clause providing that the loss be payable to the

mortgagee as his interest may appear, there are, in effect, two separate contracts, one between the insurer and the mortgagor or owner of the property, and the other between the insurer and the mortgagee. The mortgagor may lose his right of recovery on the policy without affecting the mortgagee's rights. *Secombe v. Glens Falls Ins. Co.*, 45 Cal. App. 611, 188 P. 305; *Welch v. British American Assur. Co.*, supra (148 Cal. 223, 82 P. 964, 113 Am. St. Rep. 223, 7 Ann. Cas. 396)."

In the case of *Witherow v. United American Ins. Co.*, 101 Cal. App. 334, 281 Pac. 668, the court said at page 340:

"Where an insurance policy is written in favor of an insured and has attached to it a mortgage clause providing that the loss be payable to the mortgagee as his interest may appear there are, in effect, two separate contracts, one between the insurer and the mortgagor or owner of the property and the other between the insurer and the mortgagee. The mortgagor may lose his right of recovery on the policy without affecting the mortgagee's rights. (*Secombe v. Glens Falls Ins. Co.*, 45 Cal. App. 611 (188 Pac. 305); *Welch v. British American Assur. Co.*, supra.)"

(c) The Court Erred in Making Its Conclusion of Law No. 4.

In this conclusion of law, the court concluded that the Home and the Canadian policies were not to become effective until the close of the escrow. Little need be said about this conclusion. The court apparently drew this conclusion from the thin air. There is not a word of the stipulations, oral or written, or in any of the documents introduced to warrant this conclusion. The findings and the stipulations are conclusive that the Canadian and

Home policies were both conditioned to become effective on September 20, 1955 and there is not a single word or inference to warrant a varying of the terms of these documents. The court apparently again let the *Vierneisel* case influence him as these were the facts in the *Vierneisel* case, but not in the instant one.

(d) This Appellant's Liability.

This Appellant admitted that as to the interests of the plaintiff's only, it was liable under its policy, but only to that proportion that its policy bore to all other insurance. Its liability was several and as said in the case, *Globe National Fire Ins. Co. v. American Bonding and Casualty Co.*, 217 N. W. 268, 56 A. L. R. 463:

"Its liability was fixed by the face of its policy and its proportionate relation to the co-insurance. The liability of the co-insurers to the insured was several and not joint. Neither had any interest in the liability of the other except a mathematical one."

In conclusion Appellant respectfully submits that these stipulated facts conclusively show that at the time of the fire there was in effect insuring the plaintiffs, three valid and subsisting fire insurance policies totaling \$17,000.00 and that this Appellant's proportion of the loss cannot exceed that proportion that its policy of \$7,000.00 bears to \$17,000.00.

Respectfully submitted,

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*Attorneys for Appellant Tri-State Mutual
Grain Dealers Fire Insurance Company.*



No. 16226

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TRI-STATE MUTUAL GRAIN DEALERS FIRE INSURANCE COMPANY,

Appellant,

vs.

C. R. MORRIS, CONSTANCE B. HONAKER, THE HOME INSURANCE COMPANY and THE CANADIAN FIRE INSURANCE COMPANY,

Appellees.

C. R. MORRIS and CONSTANCE B. HONAKER,

Cross-Appellants,

vs.

THE HOME INSURANCE COMPANY and THE CANADIAN FIRE INSURANCE COMPANY,

Appellees.

BRIEF OF APPELLEES THE HOME INSURANCE COMPANY AND THE CANADIAN FIRE INSURANCE COMPANY.

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Appellees.

C. R. MORRIS and CONSTANCE B. HONAKER,

Cross-Appellants,

vs.

THE HOME INSURANCE COMPANY and THE CANADIAN FIRE INSURANCE COMPANY,

Appellees.

BRIEF OF APPELLEES THE HOME INSURANCE COMPANY AND THE CANADIAN FIRE INSURANCE COMPANY.

I.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS FOR JURISDICTION.

This action was commenced by plaintiffs C. R. Morris and Constance B. Honaker in the Superior Court of the State of California, in and for the County of San Diego. By petition of Appellee, The Canadian Fire Insurance Company, the action was removed to the Federal Court. [Tr. pp. 3-5.] It appears from Plaintiffs' complaint and from the petition that both Plaintiffs were citizens and residents of the State of California, and it appears from said petition that all of the defendants were citizens and residents of other jurisdictions, to-wit, The Canadian Fire

Insurance Company of Winnipeg, Canada, Tri-State Mutual Grain Dealers Fire Insurance Company of the State of Minnesota, and The Home Insurance Company of the State of New York. [Tr. pp. 3-4.] It was stipulated in the Amended Pre-Trial Stipulation "that the court has jurisdiction over the subject matter and the parties," as well as to the residence and citizenship of the parties as heretofore set forth. [Tr. pp. 36-37.] The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

The statutory provisions believed to sustain the jurisdiction of the District Court to determine the cause are 28 U. S. C. A. 1332(a), 1441 and 1446. The jurisdiction of the United States Court of Appeals to review the judgment in question is based upon 28 U. S. C. A. 1291 and 1294.

II.

STATEMENT OF CASE.

Appellees agree that the statement of the case as set forth in the brief of Appellant Tri-State Mutual Grain Dealers Fire Insurance Company (hereinafter referred to as Tri-State) is correct with the exception of the last paragraph thereof and with that exception these Appellees adopt said "Statement of the Case."

In lieu of said last paragraph of Appellant Tri-State's "Statement of the Case," the Appellees, The Home Insurance Company (hereinafter referred to as Home), and The Canadian Fire Insurance Company (hereinafter referred to as Canadian), contended in the court below, as shown by the Pre-Trial Stipulation, that:

"(a) Home Company and Canadian Company policies were not in (38) effect as to plaintiffs' interest at the time of loss.

“(b) That plaintiffs’ causes of action are barred by provisions contained in the Canadian Company and Home Company policies as follows: ‘loss, if any, shall be adjusted with the insured specifically named, unless otherwise specified by (a) written agreement, or (b) endorsement thereon.’

“(c) That the named insured, Rose W. Gilmore, did not have title to the subject property, and as such, plaintiffs or either of them, had no title to said property under Rose W. Gilmore.

“(d) That the loss, if any, of plaintiffs’ interest was insured by defendant, Tri-State Company.

“(e) The action herein was prematurely brought by reason of the fact that neither the insured, Rose W. Gilmore, or plaintiff, or either of them, rendered proof of loss to Defendants, Home Company and Canadian Company.

“(f) Plaintiffs’ action is barred by the limitation period prescribed in Home Company and Canadian Company policies, the date of loss being September 27, 1955, and the date of filing of Plaintiffs’ complaint, September 27, 1956.” [Tr. pp. 35-36.]

III.

SUMMARY OF ARGUMENT.

1. Appellees’ policies were not in effect as to plaintiffs’ interests at the time of the loss.
2. The named insured, Rose W. Gilmore, had no title to the property and plaintiffs did not acquire title through her.
3. The Appellant, Tri-State, was the sole insurer of plaintiffs’ interests at the time of the loss.

IV.

ARGUMENT.

1. Appellees' Policies Were Not in Effect as to Plaintiffs' Interests at the Time of the Loss.

The named insured in these Appellees' policies was one Rose W. Gilmore, who had entered into an escrow agreement to purchase property from Aubrey L. Owens and Emo T. Owens. [Tr. p. 32.] The Appellees, plaintiffs below, were beneficiaries of first and second trust deeds but they had made no agreement or contract with Rose Gilmore and Rose Gilmore had not, at the time of the loss, become liable to pay them. There had been no assumption by Rose Gilmore of the promissory notes securing the trust deeds; the purchaser, Gilmore, was not at the time of the loss the mortgagor of the property and had assumed no duties to the Appellees, who were the beneficiaries of the trust deeds. As between the purchaser and the beneficiaries of the trust deeds no rights, duties, or liabilities had been created at the time of the loss in question.

The escrow instructions which were admitted into evidence as Exhibit I [Tr. p. 72], mention that "title will be shown free of encumbrances" with the usual exceptions, including the trust deeds of record of the two plaintiffs below, but they fail to include an express agreement by the purchaser, Gilmore, to assume the debt secured by the trust deeds. An agreement to assume a debt secured by a trust deed is not established by a recital in the deed that the conveyance is subject to the trust deed. (*Gursky v. Rosenberg*, 105 Cal. App. 410, 287 Pac. 575.) In this instance, even if it be assumed (though it is not stated in the escrow instructions) that the buyer, Gilmore, intended to assume the obligations of the trust deeds and notes, no such obligation had arisen at the

time of the fire because the sellers had not fulfilled their obligations under the escrow, which had not closed at the time of the fire. [Tr. p. 32.] No money consideration had passed between Rose W. Gilmore and the plaintiffs below and the plaintiffs' trust deeds were executed and recorded prior to the agreement by Rose W. Gilmore to purchase the property. [Tr. p. 34.] The plaintiffs below were unable to establish any existing rights against Gilmore and, therefore, cannot rely upon any such right in an attempt to reach the policies of insurance issued by these Appellees.

The trial court's Conclusion of Law number 4 reads as follows:

"4. That the policies of insurance prepared by Home Company and Canadian Company, although delivered to Rose W. Gilmore, were not to become effective as to Rose W. Gilmore or plaintiffs or either of them, until said escrow closed; that said policies were to be substituted for the Tri-State policy at the close of said escrow; that said escrow had not closed at the time of said loss and the policies of defendants Home Company and Canadian Company, were not in force and effect at such time." [Tr. p. 55.]

Appellant, Tri-State, attacks this finding with the statement:

"Little need to be said about this conclusion. The court evidently drew this conclusion from thin air." (App. Br. p. 16.)

To the contrary, the trial court had considerable basis in fact for this conclusion, as stated in the court's Memorandum Opinion:

"(5) It's common knowledge in connection with escrows, that new insurance to be substituted

must be written or dated prior to the close of escrow. The date of close of escrow cannot often be accurately gauged. Thus, when the escrow closes, the old insurance is cancelled, premiums are prorated and rebated and the new insurance becomes effective.” [Tr. p. 42.]

Legal support for the court’s conclusion and reasoning is found in *Strauss v. Dubuque Fire & Marine Ins. Co.*, 132 Cal. App. 283, 22 P. 2d 582, 586, where the court stated:

“It is next asserted that the policy issued by the defendants was never cancelled. If the plaintiffs mean that the policy was never indorsed in ink ‘cancelled,’ then their contention conforms to the facts. However, an insurance policy is in effect cancelled when another policy is substituted for it. *Stevenson v. Sun Insurance Office*, 17 Cal. App. 282, 288, 119 P. 529; *New Zealand Ins. Co. v. Larson Lumber Co.* (C. C. A.) 13 F. (2d) 374.”

The Tri-State policy was not cancelled and, according to the Pre-Trial Stipulation, the Tri-State policy was in force as to plaintiffs’ interests at the time of the loss. [Tr. p. 35.]

We submit that the trial court correctly analyzed the nature of the escrow involved in this action and the legal effect thereof. No intention to procure double insurance in favor of the beneficiaries of the deeds of trust and notes is anywhere shown in the record. The intent was to substitute the Home and Canadian policies at the close of escrow and since escrow had not closed and Gilmore owed no obligation to the holders of the trust deeds, Home and Canadian likewise owed no obligation to them. The legal principle is succinctly set forth in 27 Cal. Jur. 2d, p. 793, Insurance Section 293, which cites in support

thereof *Wells Petroleum Co. v. Fidelity-Phenix Fire Ins. Co.*, 121 Fed. Supp. 739:

“Generally, the procurement of new insurance with intent that it shall take the place of existing insurance, and with no intent to thereby acquire additional insurance, constitutes an effective voluntary cancellation of the existing insurance, in which case the insured may not recover under both policies, despite physical possession, by the insured or his agent, of the original policy, and though the premium return, due on cancellation of the original policy, has not been made at the time the loss occurs.”

As stated in *Hayward Lumber & Investment Co. v. Lyders*, 139 Cal. App. 517, 34 P. 2d 805, 811:

“The ‘interest’ of the mortgagee referred to in such a clause is not his interest in the property insured, but the ‘interest’ or amount which the mortgagor has appointed him to collect from the proceeds of the policy.”

It would scarcely be realistic to suppose that a purchaser of property would have any desire to have a mortgagee or trust deed holder collect for him where the purchaser had not as yet assumed any obligation under the mortgage or trust deed.

2. The Named Insured, Rose W. Gilmore, Had No Title to the Property and Plaintiffs Did Not Acquire Title Through Her.

Had the vendor at the time of the loss, or prior thereto, defaulted to the holders of the trust deeds and lost or relinquished title, the purchaser, Gilmore, could have avoided the contract because of material failure or consideration. The case of *Vierneisel v. Rhode Island Insurance Co.*, 77 Cal. App. 2d 229, 175 P. 2d 63, holds

that where grantors had executed written escrow instructions and delivered a fire policy and deed to the escrow holder, but the grantees were not then entitled to receive the deed and the conditions of the escrow were not certain to happen title had not passed to the grantee and the grantors were entitled to collect on their policy as sole and unconditional owners. Likewise, in this case the escrow had not closed, title had not passed and the conditions of the escrow were not certain to happen. The appellant states, without basis, that the trial court misconceived the holding in the *Vierneisel* case (Appellant's Br. p. 11), and comments that in the case of *Central Manufacturers Mutual Ins. Co. v. Jim Dandy Markets, Inc.*, the *Vierneisel* case was distinguished. In the instant case, however, the passing of title, which does not occur until delivery of the deed and compliance with the terms of the escrow, is of great importance in the determination as to whether Appellees' policies were effective at the time of the loss. As stated in *Holman v. Toten*, 54 Cal. App. 2d 309, 128 P. 2d 808, 810:

"It is true, Holliday's deed to plaintiff appears not to have been delivered to plaintiff from the escrow until April 14, 1941. The conditions fixed for its delivery were not such as were certain to happen, and hence title to the property did not pass to the plaintiff merely by reason of the deposit of the deed in escrow. Civ. Code, Sec. 1057."

Civil Code, Section 1662, cited by Appellant, deals with contracts for the "purchase and sale of real property" and provides for certain rights and duties which apply unless the contract expressly provides otherwise. If the purchaser is in possession of the subject matter the statute provides that by destruction without fault of the vendor
" * * * the purchaser is not thereby relieved from a

duty to pay the price.” This section does not purport to create a duty on the part of the purchaser where no such duty existed previous to the destruction of the subject matter of the contract but, rather, simply states that such destruction does not relieve the purchaser from a duty to pay. Since the escrow had not closed, since there was no obligation on the part of the purchaser, Gilmore, to the holders of the trust deeds at the time of the fire, Gilmore’s “duty to pay the price” had not yet arisen and therefore the Code section is not applicable here.

3. The Appellant, Tri-State, Was the Sole Insurer of Plaintiffs’ Interests at the Time of the Loss.

Appellant, Tri-State, argues that “* * * the real point in issue was whether or not the plaintiffs had insurance other than that of this appellant * * *.” It appears that the Appellant’s argument on this point is based upon a misconception of the mortgage clause attached to its policy. This misconception arises from a failure to consider the provision of the policy that the interest of the mortgagee shall not be invalidated by any act or neglect of the mortgagor or owner. It is stated in Couch Cyclopedia of Insurance Law, Vol. 5, page 4441, Sec. 1215b:

“And a mortgagee, in whose favor a loss is made payable as his interest may appear, is not affected by additional insurance procured by the owner upon the property without his knowledge or consent, though there is a rider attached to the policy to the effect that, if other insurance shall exist on the property, the company shall be liable only for such proportion of the loss sustained as the amount of its policy shall bear to the whole insurance on the property insured, whether the other insurance applies in the same man-

ner or not; the provisions respecting the other insurance affect the interest of the insured only, and not that of the mortgagee, unless additional insurance is obtained for his benefit and with his knowledge.”

There is no contention here that at the time of the loss the mortgagee had any knowledge of the policies taken out by the prospective purchaser and, in fact, although the mortgagees filed a proof of loss with Appellant, Tri-State [Tr. p. 33], none was filed with either the Home or the Canadian. [Tr. p. 34.] It was held in *Queen Ins. Co. v. People's Union Sav. Bank*, 50 F. 2d 63 (C. C. A. 3rd) that a mortgagee without knowledge at the time of the loss that a mortgagor had obtained other insurance did not by joining in the suit on the other policies diminish its recovery under the pro rata clause. A similar ruling was made in *Hardy v. Lancashire Ins. Co.*, 166 Mass. 210, 44 N. E. 209. There a policy of insurance payable to mortgagees as their interests might appear provided that if there should be other insurance the insured should recover no greater proportion of the loss than the sum thereby insured bore to the whole amount insured. A rider provided that in event of other insurance the company would be liable only pro rata, whether such insurance applied in the same manner or not. It was held that the limitation as to the amount to be paid in the policy affected only the interests of the named insured and the taking out of additional insurance by the mortgagor payable to himself, without the knowledge of the mortgagees, could not affect the right of the mortgagees to recover the full amount of the policy on a total loss.

It is basic that a policy of insurance does not insure property as such but only the interest of the insured in the property. *Alexander v. Security-First Nat. Bank of Los Angeles*, 7 Cal. 2d 718, 62 P. 2d 735. The policy

of Tri-State was admittedly in force and effect as to the plaintiffs' interests at the time of the loss. [Tr. p. 35.] The mortgagees derived no interest in the property from Gilmore, in whose favor the policies were written by Appellees, their interest being acquired solely as a result of an obligation of Tri-State's named insured.

The Honorable James M. Carter, Judge of the District Court, prepared a Memorandum Opinion in which various issues and findings of the case are discussed. For the sake of brevity in this brief we refer this Honorable Court to this Memorandum Opinion for the points which were not raised in Appellant's Brief.

Conclusion.

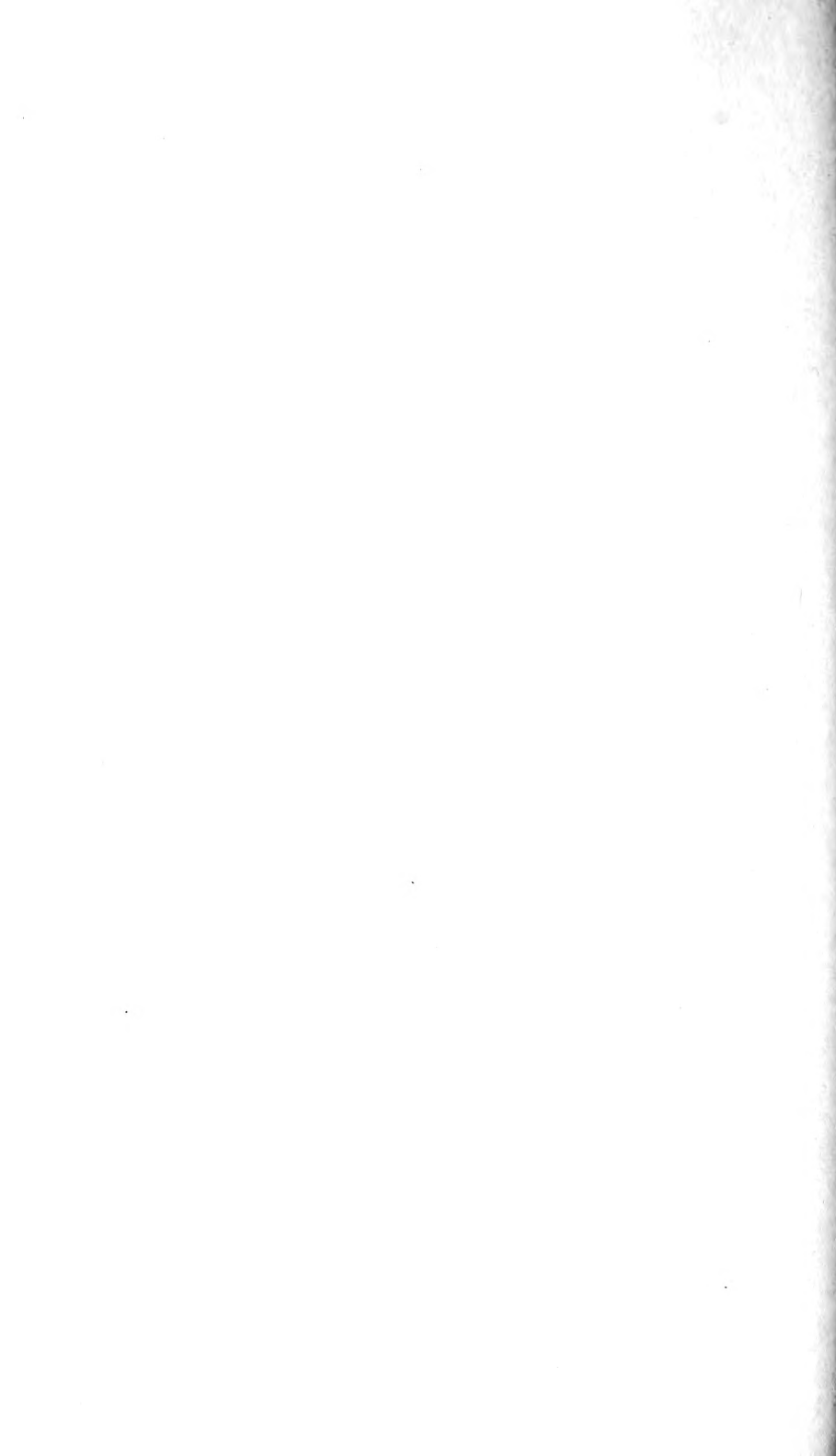
These Appellees issued policies of insurance which, we respectfully urge, the trial court correctly found were not to become effective until the close of escrow, which had not occurred at the time of the fire. The policy of Appellant, Tri-State, was admittedly in effect as to the holders of the trust deeds, and the trial court correctly found Tri-State liable in the face amount of its policy.

Respectfully submitted,

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*Attorneys for Appellees The Home Insurance
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Company.*



No. 16226

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

TRI-STATE MUTUAL GRAIN DEALERS FIRE INSURANCE COM-
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Appellant,

vs.

C. R. MORRIS, CONSTANCE B. HONAKER, THE HOME INSUR-
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COMPANY,

Appellees,

C. R. MORRIS and CONSTANCE B. HONAKER,

Cross-Appellants,

vs.

THE HOME INSURANCE COMPANY and THE CANADIAN FIRE
INSURANCE COMPANY,

Appellees.

REPLY BRIEF OF APPELLEES AND CROSS-APPELLANTS
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No. 16226

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TRI-STATE MUTUAL GRAIN DEALERS FIRE INSURANCE COMPANY,

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vs.

C. R. MORRIS, CONSTANCE B. HONAKER, THE HOME INSURANCE COMPANY and THE CANADIAN FIRE INSURANCE COMPANY,

Appellees,

C. R. MORRIS and CONSTANCE B. HONAKER,

Cross-Appellants,

vs.

THE HOME INSURANCE COMPANY and THE CANADIAN FIRE INSURANCE COMPANY,

Appellees.

REPLY BRIEF OF APPELLEES AND CROSS-APPELLANTS
C. R. MORRIS and CONSTANCE B. HONAKER

INTRODUCTORY STATEMENT

C. R. MORRIS and CONSTANCE B. HONAKER, Appellees and Cross-Appellants, as Plaintiffs below, appeal from that portion of the judgment entered in the United States District Court, Southern District of California, Southern Division, in favor of Appellees, THE HOME INSURANCE COMPANY and THE CANADIAN FIRE INSURANCE COMPANY. The status of Plaintiffs, C. R. MORRIS and CONSTANCE B. HONAKER as Appellees and as Cross-Appellants, is factually and

legally the same in both capacities, and as such, their duel position is set forth in this one brief.

JURISDICTIONAL STATEMENT

The Statement of Jurisdictional Facts as set forth in the Opening Brief of Appellant, TRI-STATE, is adopted by Plaintiffs. All parties stipulated in the Amended Pre-Trial Stipulation that the Court had jurisdiction over the subject matter and the parties. (TR. 36).

STATEMENT OF CASE

Plaintiffs, MORRIS and HONAKER, adopt the Statement of the Case as set forth in the Opening Brief of Appellant, TRI-STATE.

SPECIFICATION OF ERRORS

C. R. MORRIS and CONSTANCE B. HONAKER, as Cross-Appellants, specify the following as being errors of the trial court:

1. The Court erred in finding that the policies of insurance executed and delivered by HOME INSURANCE COMPANY and CANADIAN FIRE INSURANCE COMPANY were not in full force and effect at the time of the loss.
2. The Court erred in finding that ROSE GILMORE did not have an insurable interest in the property at the time of the loss.
3. The Court erred in its conclusion that ROSE GILMORE had no insurable interest in the property destroyed.
4. The Court erred in finding and concluding that policies of insurance of HOME INSURANCE COMPANY and CANADIAN FIRE INSURANCE COMPANY were not in force and effect at the time of the fire.

ARGUMENT

PLAINTIFFS, below, C. R. MORRIS and CONSTANCE B. HONAKER, as Appellees, are not faced with the task of opposing the contentions of Appellant, TRI-STATE, in that said Appellant has stipulated in the Amended Pre-Trial Stipulation that its policy was in force and effect as to the interest of Plaintiffs at the time of the fire loss in question (TR. 35). None of the Defendants questioned the fact that Plaintiffs are to be paid for the loss incurred, but the academic question remains as to who shall pay the loss. The prime issue to be resolved by this appeal is to determine whether or not Appellants, HOME and CANADIAN are required to proportionately share with Appellant, TRI-STATE, the loss payable.

As was observed by the trial court, this case was basically a dispute between the respective insurance companies as to their proportionate liability. From a financial viewpoint, Plaintiffs are unconcerned as to whether one insurance company or three insurance companies satisfy the judgment rendered in the trial court.

It has been Plaintiffs initial and present contention that Appellees, CANADIAN and HOME are proportionately liable to Plaintiffs, along with Appellant, TRI-STATE.

To establish the proportionate liability of CANADIAN and HOME, it seems essential to establish that ROSE GILMORE, as a vendee in possession under a pending escrow, had an insurable interest. Appellant TRI-STATE, has endeavored to support, by argument and legal authorities, that ROSE GILMORE did have an insurable interest, however, it appears that Appellant has bypassed a pivotal point which, in Plaintiffs' opinion, influenced the trial court in finding that ROSE GILMORE did not have an insurable interest. The trial court in its Memorandum Opinion stated as follows:

"Section 1662 of the Civil Code cited by TRI-STATE merely provides who has the risk of loss between purchaser and vendor. It does not affect this case . . ." (TR. 42-43). This, we believe, is where the trial court erred, in that as a matter of judicial determination there is no distinction between vendor and vendee relationship under a contract of sale on the one hand, and a vendor and vendee relationship under a pending escrow agreement, on the other. In either instance, if the vendee is *in possession*, the risk of loss falls upon the vendee. An escrow agreement is nothing more or less than a Contract of Sale, is specifically enforceable by either party, and has all of the legal characteristics and accompanying rights of what is commonly known as a Contract or Agreement of Sale.

In BROWN V. ROBERTS 121 CA 654; 9 P 2d 517, the Court in interpreting the legal effect of escrow instructions, held as follows: "That escrow instructions may be sufficient to constitute an agreement between the parties is well settled (cases cited). In the escrow instructions in this case, we find all of the necessary elements to constitute a valid agreement set forth with sufficient certainty to entitle the parties to specific performance."

It is evident that a sale of real property, whether negotiated under the label of an Agreement or Contract of Sale, or as an Escrow Agreement, is nonetheless, one and the same thing.

ROSE GILMORE, as a vendee in possession under a pending Escrow Agreement was possessed with exact rights and liabilities that she would have possessed had she been a vendee in possession under a document which would have been entitled "Agreement or Contract of Sale." Under Section 1662 of the California Civil Code, the risk of loss accompanied her possession of the premises. Having the risk of loss, ROSE GILMORE had an insurable interest. Having an insurable interest, the policies of HOME and CANADIAN covered such insurable

interest. Plaintiffs as named beneficiaries under the mortgagee clauses contained in the HOME and CANADIAN policies are entitled to judgment against CANADIAN and HOME, along with TRI-STATE, to the extent of the respective and proportionate policy limits.

Respectfully submitted,

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By William A. Yale
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No. 16230 ✓

**United States
Court of Appeals**
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

LO BUE BROTHERS, a Partnership; MARIO
LO BUE, FRED LO BUE, and JOSEPH LO
BUE, Partners, and WILLIAM LUTHER
WOODALL,

Appellees.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California
Northern Division.**

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No. 16230

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

LO BUE BROTHERS, a Partnership; MARIO
LO BUE, FRED LO BUE, and JOSEPH LO
BUE, Partners, and WILLIAM LUTHER
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Transcript of Record

Appeal from the United States District Court for the
Southern District of California
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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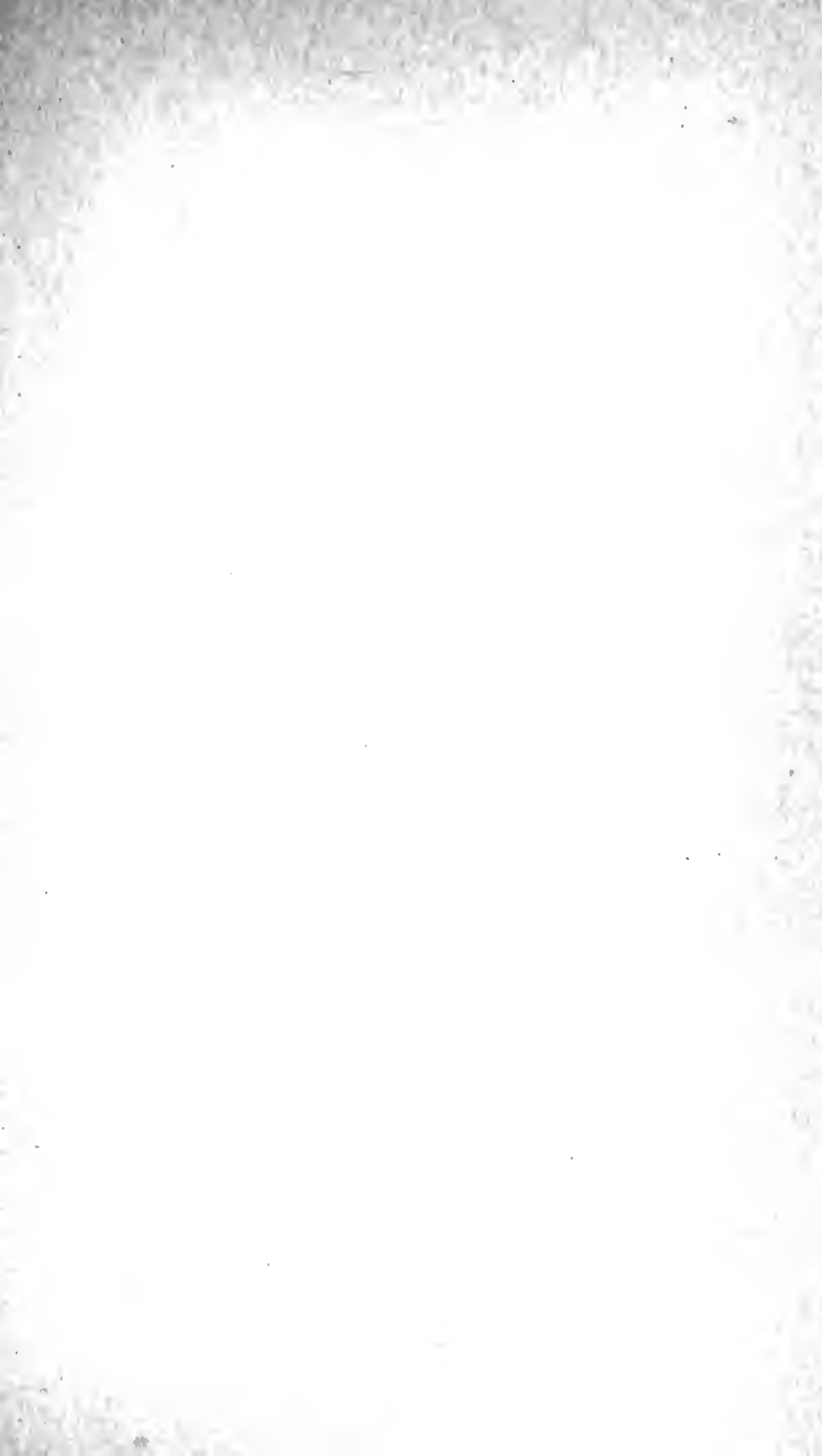
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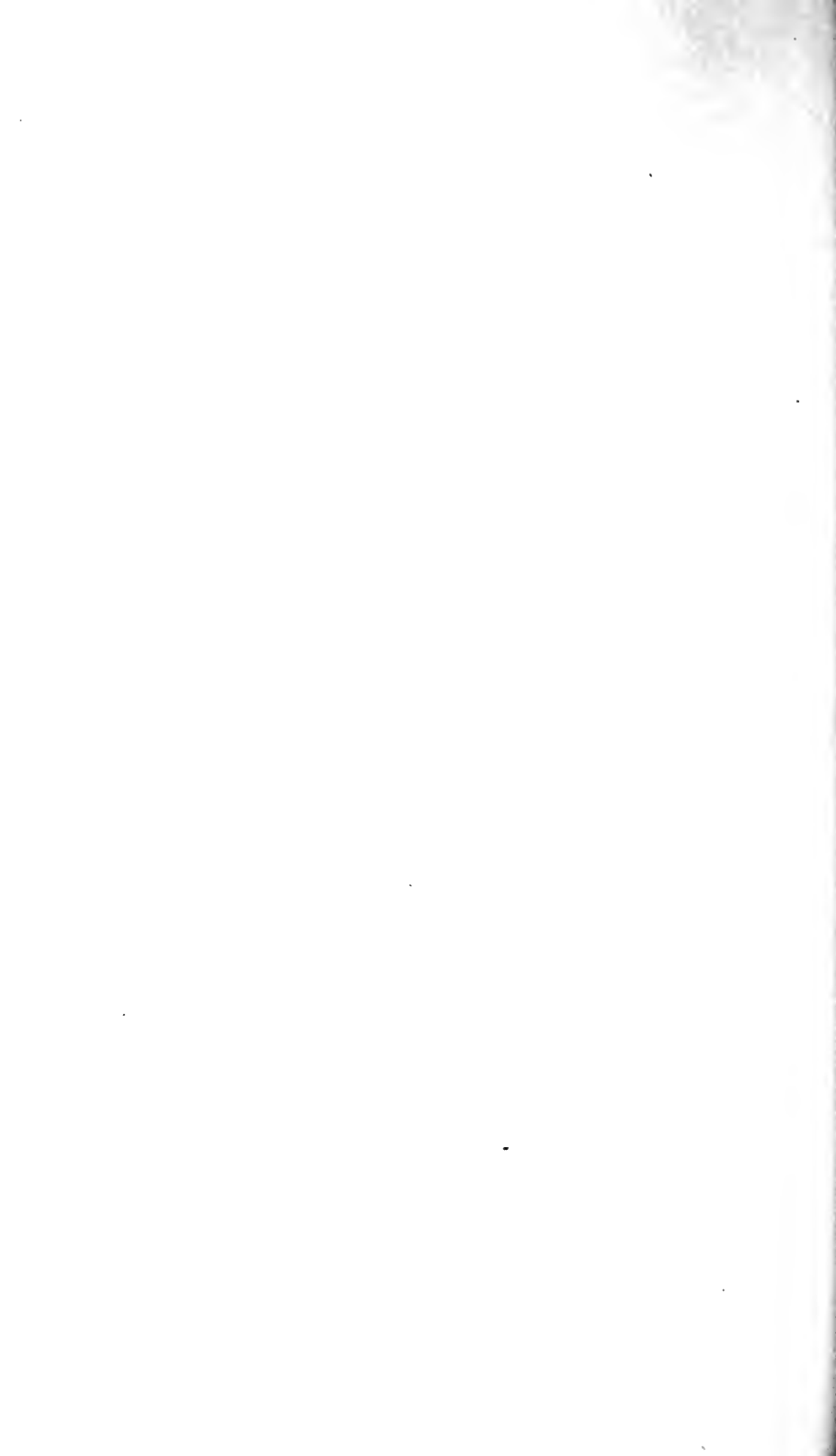
Dungan, Jack M.

—direct 149

Street, M. D.

—direct 143





NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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For Appellee:

G. V. WEIKERT,
650 South Grand Avenue,
Los Angeles 7, California.

United States District Court, Southern District of
California, Northern Division

Civil No. 1758—ND

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LO BUE BROTHERS, a Partnership; MARIO
LO BUE, FRED LO BUE, and JOSEPH LO
BUE, Partners; and WILLIAM LUTHER
WOODALL,

Defendants.

COMPLAINT FOR RECOVERY
FOR FORFEITURES

The United States of America complains of the
defendants and for cause of action alleges:

I.

This is a civil action brought by the United States
of America, acting through the United States At-
torney for the Southern District of California, at
the request of the Secretary of Agriculture, Juris-
diction of this court arises under paragraphs (5)
and (7) of Section 608a of Title 7, and Sections 1345
and 1355 of Title 28 of the United States Code. [2*]

II.

The defendants, Mario Lo Bue, Fred Lo Bue and
Joseph Lo Bue, are partners operating an orange

*Page numbering appearing at foot of page of original Certified
Transcript of Record.

packing establishment as a partnership under the trade name Lo Bue Brothers (hereinafter referred to as "Lo Bue") at Lindsay, California, within the jurisdiction of this court. Defendant William Luther Woodall is the sales manager for Lo Bue Brothers and resides at Lindsay, California, within the jurisdiction of this court.

III.

Pursuant to the provisions of Title 7, Sec. 608c of the United States Code, the Secretary of Agriculture (hereinafter referred to as the "Secretary") issued Marketing Order No. 14, as amended, Regulating the Handling of Navel Oranges Grown in the State of Arizona and a Designated Part of the State of California (hereinafter referred to as the "Order") effective September 22, 1953.

IV.

Section 914.66 of the Order establishes four geographical prorate districts for the purpose of allotting shipments of oranges, as follows:

a. District 1 shall include that portion of the State of California between the 35th Parallel and the 37th Parallel, but shall exclude that portion of Kern County situated south of the Kern River. [3]

b. District 2 shall include that portion of the State of California which is south of the 35th Parallel, but shall exclude Imperial County, California, and that portion of Riverside County, California, situated south and east of White Water, California.

c. District 3 shall include the State of Arizona, Imperial County, California, and that portion of Riverside County, California, situated south and east of White Water, California.

d. District 4 shall include that portion of Kern County, California, situated south of the Kern River.

V.

Acting pursuant to the provisions of the Order, the Secretary fixed the quantity of navel oranges grown in Prorate District 1 which could be handled during the weekly period covered by Navel Orange Regulation No. 81 commencing at 12:01 a.m. on April 1 and ending at 12:01 a.m. on April 8, 1956, at 277,200 cartons (21 F.R. 2037) and during the weekly period covered by Navel Orange Regulation No. 82 commencing at 12:01 a.m. on April 8 and ending at 12:01 a.m. on April 15, 1956, at 231,000 cartons. (21 F.R. 2267.) [4]

VI.

Pursuant to Section 914.53 of the Order, Lo Bue acting through one of the partners, Mario Lo Bue, filed with the Navel Orange Administrative Committee (hereinafter referred to as the "Committee"), the agency appointed by the Secretary to administer the Order, an application for a prorate base and for allotment to ship navel oranges produced in Prorate District 1. Based upon such application, and the determinations of the Committee, Lo Bue was found, during the weekly period covered by Navel Orange Regulation No. 81 (12:01

a.m., April 1, to 12:01 a.m., April 8) to have available for current shipment 3.7622 per cent of all navel oranges produced in District 1 which were available for current shipment during such period, and was allotted 10,428 cartons of the 277,200 cartons fixed by the Secretary as the quantity of navel oranges produced in Prorate District 1 that could be handled during such period. (277,200 x 3.7622.)

VII.

In addition to the 10,428 cartons of allotment issued to Lo Bue during the weekly period covered by Navel Orange Regulation No. 81 (12:01 a.m., April 1, to 12:01 a.m., April 8) there was paid back to Lo Bue by other handlers, pursuant to Section 914.57 of the Order, 892 cartons of allotment which had previously been loaned by Lo Bue. Under the provisions of Section 914.55 [5] of the Order, Lo Bue was permitted to overship his base allotment of 10,428 cartons by 10%, or 1,043 cartons, making a total of 12,363 cartons of navel oranges which Lo Bue was authorized to handle under the provisions of the Order and the regulations of the Secretary during the weekly period covered by Navel Orange Regulation No. 81.

VIII.

During the weekly period covered by Navel Orange Regulation No. 82 (12:01 a.m., April 8, to 12:01 a.m., April 15) it was determined by the Committee that Lo Bue had available for current shipment 3.7671 per cent of all navel oranges produced in District 1 available for current shipment during

such period, and was allotted 8,702 cartons of the 231,000 cartons fixed by the Secretary as the quantity of navel oranges that should be handled during such period. (231,000 x 3.7671.)

IX.

In addition to the 8,702 cartons of allotment issued to Lo Bue during the weekly period covered by Navel Orange Regulation No. 82 (12:01 a.m., April 8, to 12:01 a.m., April 15) there was paid back to Lo Bue by other handlers 36 cartons of allotment previously loaned by Lo Bue, making a total of 8,738 cartons of allotment issued or paid back to Lo Bue during this period. Pursuant to Section 914.55 of the Order, Lo Bue was required to deduct from the 8,738 cartons the [6] 1,043 cartons of overshipment made during the weekly period covered by Navel Orange Regulation No. 81 and to repay 262 cartons of allotment which they had previously borrowed from other handlers. (Section 914.57 of the Order.) This left a balance of 7,433 cartons of navel oranges which Lo Bue was authorized to handle under the provisions of the Order and the regulations of the Secretary during the weekly period covered by Navel Orange Regulation No. 82. (12:01 a.m., April 8, to 12:01 a.m., April 15.)

X.

Although Lo Bue was authorized under the Order and the regulations of the Secretary to handle 12,363 cartons of navel oranges produced in District 1 during the weekly period covered by Navel Orange

Regulation No. 81 (12:01 a.m., April 1, to 12:01 a.m., April 8) they did actually handle during such regulation period a total of 35,779 cartons, and did wilfully exceed their quota or allotment by 23,416 cartons.

XI.

Although Lo Bue was authorized under the Order and the regulations of the Secretary to handle 7,433 cartons of navel oranges produced in District 1 during the weekly period covered by Navel Orange Regulation No. 82 (12:01 a.m., April 8, to 12:01 a.m., April 15) they did actually handle during such regulation period 16,281 cartons, and did wilfully exceed their quota [7] or allotment by 8,848 cartons, 2,933 cartons of which were handled in excess of their allotment prior to April 9, 1956, the date on which Lo Bue filed with the Secretary a petition under Section 608c(15)(A) of the act. (7 U.S.C. 608c(15)(A).)

XII.

On or about March 15 and March 29, 1956, the defendant, William Luther Woodall, Lo Bue's sales manager, appeared at the meetings of the Naval Orange Administrative Committee in Los Angeles, California, and urged that handlers shipping oranges produced in District 1 be issued 75% of all of the allotment issued to all handlers in California and that the handlers shipping oranges produced in District 2 be issued only 25% of all of the allotment issued to all handlers in California. He then stated to the Committee that he was going

to ship the fruit regardless of what the Committee did.

XIII.

On or about March 29, 1956, Defendant William Luther Woodall, following a meeting of the committee, in conversation with M. T. Coogan, manager of the Committee stated that he (Woodall) had a plan whereby he was going to ship all of his oranges, and that, "Of course, I am not going to tell you when I am going to do this." [8]

XIV.

Thereafter Lo Bue, acting through their sales manager, William Luther Woodall, did sell and ship oranges produced in District 1 in violation of the Order and the regulations of the Secretary, and did wilfully exceed their quotas or allotments as set forth in paragraphs X and XI hereof and did make the sales and shipments as set forth in Appendix A attached hereto and made a part hereof, and the defendant, William Luther Woodall, did knowingly participate in and aid in the exceeding of such quotas and allotments by Lo Bue in that he did negotiate the sales and did sell the navel oranges handled by Lo Bue in excess of their allotments knowing that such handling was in excess of Lo Bue's allotments.

XV.

The 26,349 cartons of navel oranges produced in District 1 which Lo Bue handled in excess of their allotment prior to April 9, 1956, were sold to various customers throughout the United States, and

Lo Bue received the sum of approximately \$49,870.74 for the sale of such oranges, which sum was the then current market value of such oranges. A complete list of the sales made during the weekly periods covered by Navel Orange Regulations Nos. 81 and 82 prior to April 9, 1956, which were in excess of Lo Bue's allotment is shown on Appendix A attached. Three [9] times this sum which plaintiff is entitled to recover from the defendants is \$149,612.22.

Wherefore Plaintiff Prays:

1. For judgment against defendants in the sum of One Hundred Forty-nine Thousand Six Hundred Twelve Dollars and Twenty-two Cents (\$149,612.22) being an amount equal to three times the then current market value of the above-described oranges.

2. Cost of this action.

3. Such other relief as the court may deem proper.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant United States Attorney, Chief of the Civil
Division;

JORDAN A. DREIFUS,
Assistant United States
Attorney;

By /s/ JORDAN A. DREIFUS,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

Appendix A

[Appendix A attached to the foregoing is identical to Appendix A attached to the Stipulation of Facts and issues, see page 33 of this printed record.]

[Endorsed]: Filed April 25, 1957. [10]

[Title of District Court and Cause.]

ANSWER

Come Now the above-named defendants, and for answer to the complaint on file herein admit, deny, and allege as follows:

First Defense

Defendants allege that the complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

I.

Defendants deny that this Court has jurisdiction of this action under the statutory provisions referred to in paragraph I of said complaint, or otherwise, or at all.

II.

Defendants allege that they are without knowledge [13] or information sufficient to form a belief as to the truth of the allegations contained in para-

graph V of said complaint, and upon that ground deny each and all of the allegations therein.

III.

Defendants admit that Defendant Lo Bue Brothers, a partnership, filed with the Navel Orange Administrative Committee an application for a pro-rate base and for allotments to ship navel oranges produced in Prorate District 1.

Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of any of the other allegations contained in paragraph VI of said complaint, and upon that ground deny each and all of the other allegations therein. Defendants allege that if the Secretary purported to limit and restrict the quantity of navel oranges produced in Prorate District 1 that could be handled during the period referred to in paragraph VI of said complaint as therein alleged, he acted contrary to law in so doing.

IV.

Answering paragraph VII of said complaint, defendants deny that Defendant Lo Bue Brothers, a partnership, was authorized to handle no more than 12,363 cartons of naval oranges during the period referred to in said paragraph VII.

Further answering said paragraph VII, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of any of the other allegations contained therein,

and upon that ground deny each and all of the other allegations therein.

V.

Defendants alleges that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph VIII of said complaint, and [14] upon that ground deny each and all of the allegations therein. Defendants alleges that if the Secretary purported to limit and restrict the quantity of navel oranges produced in Prorate District 1 that could be handled during the period referred to in paragraph VIII of said complaint as therein alleged, he acted contrary to law in so doing.

VI.

Answering paragraph IX of said complaint, defendants deny that Defendant Lo Bue Brothers, a partnership, was authorized to handle no more than 7,433 cartons of navel oranges during the period referred to in said paragraph IX.

Further answering said paragraph IX, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of any of the other allegations contained therein, and upon that ground deny each and all of the other allegations therein.

VII.

Defendants deny, generally and specifically, each and all of the allegations contained in paragraphs X and XI of said complaint.

VIII.

Defendants deny that Defendant William Luther Woodall made the statement attributed to him in paragraph XII of said complaint.

IX.

Defendants deny, generally and specifically, each and all of the allegations contained in paragraphs XIII, XIV, and XV of said complaint.

Third Defense

I.

That Defendant Lo Bue Brothers, a partnership, is a [15] grower, handler and shipper of navel oranges in Tulare County, California, in the area known as the Central California District, and designated by the Secretary of Agriculture as Prorate District 1. In addition to handling and shipping its own fruit, said defendant handles and ships oranges on consignment for other growers, in intrastate and interstate commerce.

The normal shipping season for Central California navel oranges ends not later than April 1st of each year, experience having proved that navel oranges from said district held beyond that date deteriorate so rapidly that they have little or no commercial value. Consequently, it has been the uniform practice prior to the navel orange shipping season of 1956 to terminate all restrictions on shipments from said district not later than March 25th of each year.

In the year 1956 the Navel Orange Administrative Committee, with the approval of the Secretary of Agriculture, reduced the quantities of Central California navel oranges permitted to be marketed week by week during the shipping season so far below normal that a large quantity of such oranges remained unharvested and unshipped at the end of March, and said Committee indicated that it intended to continue to restrict weekly shipments of such oranges well into the month of May.

Meanwhile, Central California navel oranges had come into competition with Southern California navel oranges, which generally mature later and have a much longer historical life. Market resistance to the Central California fruit had been rapidly developing, and by April 2, 1956, there was a differential of from 75c to \$1.00 per carton in favor of Southern California fruit, due to its superior quality. Continuing deterioration of the Central California fruit would make it practically worthless after the week commencing April 2nd.

Continuation of the Navel Orange Administrative Committee's said policy of prorating shipment would have meant [16] that said defendant would be able to ship only about 33 cars of navel oranges between April 2nd and May 6th, 1956, and would still have had approximately 40 cars left on that date. All such fruit unshipped after the week of April 2nd would be a total loss.

The Navel Orange Administrative Committee had been operating with only one member representing

Central California. While so operating it had extended and proposed to extend the marketing period for Central California fruit some eight weeks beyond its historical life, while extending the marketing period for Southern California fruit less than two weeks past its historical life, thus discriminating in favor of the Southern California growers, handlers and shippers.

II.

That on April 6th, 1956, and prior to the shipment by Defendant Lo Bue Brothers, a partnership, of any navel oranges alleged in plaintiff's complaint to have been in excess of said defendant's quota or allotment, said defendant duly filed with the Secretary of Agriculture, at Washington, D. C., a petition for relief from Order No. 14, and particularly from the obligations imposed upon said defendant in connection therewith, pursuant to and in accordance with the provisions of Section 608c(15)(A) of the Act. (7 U.S.C. 608c(15)(A).) That in said petition said defendant set forth the matters and things alleged in paragraph I above, alleged that the action of the Navel Orange Administrative Committee, approved by the Secretary of Agriculture, in restricting the shipment of Central California navel oranges beyond their historical life was arbitrary, capricious, unreasonable, inequitable, discriminatory, oppressive, unfair and unjust, that the declared policy and purpose of the Act was thereby defeated, and that said defendant and its growers were thereby being deprived of their property with-

out due process of law, and their property had been and was thereby being taken, confiscated, and destroyed without [17] compensation therefor, all in violation of the Fifth Amendment to the Constitution of the United States. That in and by said petition said defendant prayed that the Secretary of Agriculture grant said defendant a hearing thereon, in accordance with the provisions of Section 608c (15)(A) of the Act and the regulations made by the Secretary of Agriculture thereunder, that all restrictions upon the shipment of Central California navel oranges under Order No. 14, and all obligations imposed in connection therewith, be terminated forthwith, or that said defendant be exempted therefrom, that Order No. 14 be so amended or modified as to prevent a repetition in the future of the situation complained of in said petition, or that Order No. 14 be terminated and cancelled forthwith, and for such other and further relief as might be meet and just in the premises.

III.

That on April 12, 1956, plaintiff filed an action, No. 1637—ND in this Court, against Defendant Lo Bue Brothers, a partnership, and the defendant partners, to enjoin violations of Order No. 14, under Section 608a(5)(6) of the Act, and at the same time obtained a temporary restraining order against said defendants therein. That on April 19, 1956, a consent decree for permanent injunction was made and entered against said defendants in said action, enjoining them from violating Order No. 14 and any

lawful order, rule or regulation issued by the Secretary of Agriculture thereunder.

IV.

That an answer to the petition of Defendant Lo Bue Brothers, a partnership, above referred to, was filed by the Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture, on May 9, 1956, and an oral hearing was held upon said petition, at Los Angeles, California, on June 14, 1956, at which time and place said petitioning defendant appeared, [18] with counsel, and introduced evidence both oral and documentary in support of said petition, and counsel for the Department of Agriculture introduced evidence both oral and documentary in opposition to said petition. That thereafter briefs were filed on behalf of said petitioning defendant and on behalf of the Department of Agriculture, and on September 28, 1956, the hearing examiner issued a report containing proposed findings of fact and conclusions and recommending that the petition be dismissed, to which report said petitioning defendant filed written exceptions. That on December 3, 1956, the judicial officer of the Department of Agriculture issued his decision and order denying the relief requested by the petitioning defendant and dismissing the said petition.

Wherefore, defendants pray:

1. That the complaint herein be dismissed, and that plaintiff take nothing thereby.

2. That defendants recover their costs herein expended and incurred.

3. That defendants be given such other, further and different relief as may be meet and proper in the premises.

/s/ G. V. WEIKERT,

Attorney for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed June 7, 1957. [19]

[Title of District Court and Cause.]

STIPULATION OF FACTS AND ISSUES

Whereas, the United States of America has filed a complaint in the United States District Court, Southern District of California, Northern Division, seeking to recover a statutory forfeiture from the defendants under the provisions of Section 8a(5) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C., Section 608a(5)); and

Whereas defendants have filed their answer and it appears that there are matters of fact that can be agreed upon,

Now, Therefore, It Is Hereby Stipulated by and between the above-named parties, by and through their respective counsel, Laughlin E. Waters, United States Attorney; Richard A. Lavine, [22] Chief of

the Civil Division, and Jordan A. Dreifus, Assistant United States Attorney, attorneys for the plaintiff, and G. V. Weikert, attorney for the defendants, as follows:

1. This is a civil action brought by the United States of America, acting through the United States Attorney for the Southern District of California, at the request of the Secretary of Agriculture.

2. The defendants, Mario Lo Bue, Fred Lo Bue and Joseph Lo Bue, are partners operating as growers, handlers and shippers of navel oranges in Tulare County, California, which is in Central California in the area designated by the Secretary of Agriculture as Prorate District No. 1. At Lindsay, California, within this area they operate an orange packing establishment as a partnership under the trade name Lo Bue Brothers. William Luther Woodall is the sales manager for Lo Bue Brothers and resides in Tulare County, California.

3. Pursuant to Title 7, Section 608c of the United States Code, the Secretary of Agriculture issued Marketing Order No. 14, as amended, regulating the handling of navel oranges in the State of Arizona and a designated part of the State of California. The order became effective on October 22, 1953, and has remained constantly in effect since that date.

4. Four geographical prorate districts were established by the Secretary of Agriculture under

Section 914.66 of Order No. 14 for the purpose of allotting shipments of oranges, as follows:

a. District 1 shall include that portion of the State of California between the 35th Parallel and the 37th [23] Parallel, but shall exclude that portion of Kern County situated south of the Kern River.

b. District 2 shall include that portion of the State of California which is south of the 35th Parallel, but shall exclude Imperial County, California, and that portion of Riverside County, California, situated south and east of White Water, California.

c. District 3 shall include the State of Arizona, Imperial County, California, and that portion of Riverside County, California, situated south and east of White Water, California.

d. District 4 shall include that portion of Kern County, California, situated south of the Kern River.

5. The Secretary of Agriculture fixed the quantity of navel oranges grown in Prorate District 1, which could be handled during the weekly period covered by Navel Orange Regulation No. 81 commencing at 12:01 a.m. on April 1, and ending at 12:01 a.m. on April 8, 1956, at 277,200 cartons as set forth in the Federal Register, 21 F.R. 2037. During the weekly period covered by Navel Orange Regulation No. 82, commencing at 12:01 a.m. on April 8, and ending at 12:01 a.m. on April 15, 1956, the

quantity fixed was 231,000 cartons as set forth in the Federal Register, 21 F.R. 2267.

6. On October 18, 1955, Lo Bue Brothers filed with the Navel Orange Administrative Committee an application for a prorated [24] base and allotment to ship navel oranges produced in Prorate District 1 during the 1955-56 marketing season. Based upon such application the committee determined that during the weekly period covered by Navel Orange Regulation No. 81 (12:01 a.m., April 1, to 12:01 a.m., April 8, 1956) Lo Bue Brothers had available for current shipment 3.7622 per cent of all navel oranges produced in District 1 which were available for shipment during such period. Lo Bue Brothers were allotted 10,428 cartons of the 277,200 cartons fixed by the Secretary of Agriculture as the quantity of navel oranges produced in Prorate District 1 that should be handled during such period.

7. There was paid back to Lo Bue Brothers during the weekly regulation period covered by Navel Orange Regulation No. 81 (12:01 a.m., April 1, to 12:01 a.m., April 8, 1956) allotment totaling 892 cartons which had previously been loaned by Lo Bue. Under the provisions of Sections 914.55 and 914.57 of Order No. 14, Lo Bue was permitted to overship his base allotment of 10,428 cartons by 10%, or 1,043 cartons, thus making a total of 12,363 cartons of navel oranges which was available to Lo Bue for shipment under said allotment during the

weekly regulation period covered by Navel Orange Regulation No. 81.

8. The committee determined that based upon the application filed by Lo Bue for a prorated base and allotment Lo Bue Brothers had available for current shipment during the weekly period covered by Navel Orange Regulation No. 82 (12:01 a.m., April 8, to 12:01 a.m., April 15, 1956), 3.7671 per cent of all navel oranges produced in District 1 available for current shipment during such period. Lo Bue Brothers were allotted 8,702 cartons of the 231,000 cartons fixed by the Secretary as the quantity of navel oranges that should be handled in Pro-rata District 1 during such period.

9. There was paid back to Lo Bue Brothers during weekly regulation period covered by Navel Orange Regulation No. 82 [25] (12:01 a.m., April 8, to 12:01 a.m., April 15, 1956) allotment totaling 36 cartons which had previously been loaned by Lo Bue, making a total of 8,738 cartons of allotment issued or paid back to Lo Bue during this period. Under Sections 914.55 and 914.57 of the order (if said provisions were legally binding on Lo Bue), Lo Bue was required to deduct from the 8,738 cartons the 1,043 cartons of overshipment made during the weekly regulation period covered by Navel Orange Regulation No. 81 and to repay 262 cartons of allotment which they had previously borrowed from other handlers. After making these adjustments there remained available to Lo Bue for shipment under said allotment during the weekly regu-

lation period covered by Navel Orange Regulation No. 82 allotment for 7,433 cartons of navel oranges.

10. During the weekly period covered by Navel Orange Regulation No. 81 (12:01 a.m., April 1, to 12:01 a.m., April 8, 1956) Lo Bue Brothers handled a total of 35,779 cartons of navel oranges produced in District 1, which was 23,416 cartons in excess of the allotment issued to them by the Navel Orange Administrative Committee for such period.

11. During the weekly period covered by Navel Orange Regulation No. 82 (12:01 a.m., April 8, to 12:01 a.m., April 15, 1956) Lo Bue Brothers handled a total of 16,281 cartons of navel oranges produced in District 1 which was 2,933 cartons in excess of the allotment issued to them by the Navel Orange Administrative Committee, prior to April 9, 1956.

12. The 26,349 cartons of navel oranges produced in Prorate District 1 which Lo Bue Brothers handled in excess of their allotment, prior to April 9, 1956, if such allotment was legally binding on them, were ultimately sold to various customers throughout the United States. Lo Bue Brothers ultimately received the gross sum of approximately \$49,870.74 for the sale of such oranges, as appears in Appendix A attached hereto. A complete list of [26] shipments made by Lo Bue Brothers during weekly periods covered by Navel Orange Regulations Nos. 81 and 82, prior to April 9, 1956, which were in excess of Lo Bue's allotment, if such allotment was binding on them, is shown on Appendix A attached.

13. On April 5, 1956, Lo Bue Brothers mailed, by air mail, to the Hearing Clerk, Office of the Secretary, U. S. Department of Agriculture, Washington 25, D. C., a petition for relief from Order No. 14 [and particularly from the obligations imposed upon said defendant in connection therewith], pursuant to the provisions of Section 608c(15)(A) of the Agricultural Marketing Agreement Act of 1937. (7 U.S.C. 608c(15)(A).) This petition alleged that the normal shipping season for Central California navel oranges ends not later than April 1 of each year; that experience has proved that navel oranges from this district held beyond that date deteriorate so rapidly that they have little or no commercial value. Consequently, it has been the uniform practice prior to the navel shipping season of 1956 to terminate all restrictions on shipments from this district not later than March 25 of each year. It further alleged that in the year 1956, the Navel Orange Administrative Committee with the approval of the Secretary of Agriculture, reduced the quantities of Central California navel oranges permitted to be marketed week by week during the shipping season so far below normal that a large quantity of such oranges remained unharvested and unshipped at the end of March, and said Committee indicated that it intended to continue to restrict weekly shipments of such oranges well into the month of May.

The petition further alleged that meanwhile, Central California navel oranges had come into com-

petition with Southern California navel oranges, which generally mature later and have a much longer historical life. Market resistance to Central California fruit had been rapidly developing and by April 2, 1956, there [27] was a differential of from 75c to \$1.00 per carton in favor of Southern California fruit due to its superior quality. Continuing deterioration of the Central California fruit would make it practically worthless after the week commencing April 2. Continuation of the Navel Orange Administrative Committee's policy of prorating shipments would have meant that said defendant would be able to ship only about 33 cars of navel oranges between April 2 and May 6, 1956, and would still have had approximately 40 cars left on that date. All such fruit unshipped after the week of April 2 would be a total loss.

It further alleged that the Navel Orange Administrative Committee had been operating with only one member representing Central California and that while so operating had extended and proposed to extend the marketing period for Central California fruit some 8 weeks beyond its historical life, while extending the marketing period for Southern California fruit less than two weeks past its historical life, thus discriminating in favor of Southern California growers, handlers, and shippers. That the action of the Navel Orange Administrative Committee, approved by the Secretary of Agriculture, in restricting the shipment of Central California navel oranges beyond their historical life

was arbitrary, capricious, unreasonable, inequitable, discriminatory, oppressive, unfair, and unjust, that the declared policy and purpose of the Act was thereby defeated, and that said defendant and its growers were thereby being deprived of their property without due process of law, and their property had been and was thereby being taken, confiscated, and destroyed without compensation therefor, all in violation of the Fifth Amendment to the Constitution of the United States.

The petition prayed that the Secretary of Agriculture grant defendant, Lo Bue Brothers, a hearing and that all restrictions [28] upon the shipment of Central California navel oranges under Order No. 14 and all obligations imposed in connection therewith be terminated forthwith, or that the defendant be exempted therefrom, and that Order No. 14 be so amended or modified as to prevent a repetition in the future of the situation complained of, or that Order No. 14 be terminated and cancelled forthwith.

14. An answer to the petition of the petitioning defendant Lo Bue Brothers was filed by the Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture on May 9, 1956, and a hearing was held on the petition on June 14, 1956, at Los Angeles, California, at which time the petitioning defendant Lo Bue Brothers appeared with counsel and introduced evidence both oral and documentary in support of said petition. Counsel for the Department of Agriculture intro-

duced evidence both oral and documentary in opposition to said petition. Thereafter briefs were filed by both parties and on September 28, 1956, the Hearing Examiner issued a report containing proposed findings of fact and conclusions and recommending that the petition be dismissed. The petitioning defendant, Lo Bue Brothers, filed written exceptions to this report and on December 3, 1956, the Judicial Officer of the Department of Agriculture issued his decision and order denying the relief requested, and dismissing the petition. (15 Ag. Dec. 1285.) No appeal to the courts of the United States was taken by the petitioning defendant Lo Bue Brothers from the decision of the Judicial Officer of the Department of Agriculture.

15. On April 12, 1956, plaintiff filed an action No. 1637—ND in this Court against the defendant Lo Bue Brothers, a partnership, and the defendant partners, to enjoin violations of Order No. 14, under 7 U.S.C., Section 608a(5)(6) of the United States Code. A temporary restraining order against the defendants [29] was issued and was followed on April 19, 1956, by a consent decree for permanent injunction enjoining them and all of their agents and persons acting for them from violating Order No. 14 and any lawful order, rule, or regulation issued by the Secretary of Agriculture thereunder.

16. That Appendix B attached hereto is a true photocopy of the envelope in which the petition described in stipulation 13 was mailed.

17. That Christopher C. Robinson, was at all times material a postal clerk employed at the main United States Post Office, Washington, D. C.; that if he was called, sworn, and examined as a witness in this case, he would testify substantially as appears in the statement dated August 28, 1957, a copy of which is attached hereto as Appendix C.

18. That Paul Lewis was, at all times material, a postal clerk employed in the Agricultural Post Office, Washington, D. C.; that if he was called, sworn, and examined as a witness in this case, he would testify substantially as appears in the statement dated August 29, 1957, a copy of which is attached hereto as Appendix D.

19. That Nellie C. Chase was, at all times material, employed as a clerk in the Hearing Clerk's Section of the Office of the Secretary of the U. S. Department of Agriculture; that if she was called, sworn and examined as a witness in this case, she would testify substantially as appears in the statement dated August 29, 1957, a copy of which is attached hereto as Appendix E.

20. That Agnes B. Clarke was, at all times material, the Hearing Clerk in the Office of the Secretary, U. S. Department of Agriculture, Washington, D. C.; that if she was [30] called, sworn, and examined as a witness in this case, she would testify substantially as appears in the statement dated August 29, 1957, a copy of which is attached hereto (including the first page only of said petition), as Appendix F.

21. That William G. Sparkman was at all times material, employed as a Postal Clerk in the Agriculture Post Office; that if he was called, sworn, and examined as a witness in this case, he would testify substantially as appears in Appendix G.

22. That copies of U. S. Post Office Form 3877 entitled "Application for Registration and Certificate of Declared Value [etc.], dated April 7, 1956, U. S. Department of Agriculture P. & O. Form 4, and U. S. Postal Form 1115, and all the entries on them, as attached hereto in Appendix H, are true copies of the documents referred to in Appendices C, D, E, and G, mentioned above.

23. The parties expressly reserve the right to object to any and all of the foregoing stipulated facts on the grounds of irrelevancy or immateriality, and shall be free to argue the legal effect or conclusions that can be drawn from them.

Issues of Law to Be Tried

1. Whether this court has jurisdiction of this suit under 7 U.S.C. 608a(5)-(9).

2. Whether, in this suit, there can be brought into question the validity, legality, or binding effect, as to the defendants, of the following, or all or any of them:

(a) Marketing Order No. 14 of the Secretary of Agriculture, (7 C.F.R. 916.66), mentioned above in the Stipulation of Facts;

(b) Navel Orange Regulations Nos. 81 and 82 mentioned above in the Stipulation of Facts; or

(c) The determinations, and the allotment limitations therein, of the Navel Orange Administrative Committee, mentioned above in Paragraphs 6, 7, 8, and 9 of the Stipulation of Facts.

3. If such may be brought into question in this suit, then in that event, whether the aforesaid Order, Regulations, or determinations, or the allotment limitations therein, or all or any of these, were invalid, illegal or without binding effect upon the defendants.

4. Whether the immunity provided by the proviso of 7 U.S.C. 608c(14) applies to this suit.

5. Whether it is material whether the petition filed by defendant Lo Bue Brothers, as stated in paragraph 13 of the foregoing Stipulation of Facts, under 7 U.S.C. 608c(15), was filed in good faith.

6. Whether it is material whether the petition filed by defendant Lo Bue Brothers, as stated in paragraph 13 of the foregoing Stipulation of Facts, under 7 U.S.C. 608c(15), was filed for the purposes of delay.

7. Whether defendant William Luther Woodall was a party to or privy to the aforementioned petition to the Secretary of Agriculture; and whether he acted jointly with, in combination with, or on behalf of Lo Bue Brothers in the acts and conduct complained of in this case.

8. If the defendants or any of them are liable, in what amount, if any, damages shall be awarded.

Issues of Fact to Be Tried

1. If material, whether or not the petition, filed by Lo Bue Brothers, under 7 U.S.C. 608c(15) was filed in good faith.

2. If material, whether or not the petition, filed by Lo Bue Brothers under 7 U.S.C. 608c(15), was filed for purposes of delay.

3. If material, exactly when the petition, filed by defendant Lo Bue Brothers under 7 U.S.C. 608c(15), was filed.

4. Whether defendant William Luther Woodall was a party to or privy to the aforementioned petition to the Secretary of Agriculture; and whether he acted jointly with, in combination with, or on behalf of Lo Bue Brothers in the acts and conduct complained of in this case.

5. If the defendants or any of them are liable, in what amount, if any, damages shall be awarded.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division.

/s/ JORDAN A. DREIFUS,
Assistant U. S. Attorney,
Attorneys for Plaintiffs.

/s/ G. V. WEIKERT,
Attorney for Defendants.

APPENDIX A

Shipments in Excess of Allotment Made by Lo Bue During
Weekly Period Covered by Navel Orange Regulation No. 81

Date of Shipment	Invoice No.	Consignee and Destination	No. of Cartons	Sales Price F.O.B. Lindsay
4-7-56	840	Safeway Stores, Inc. El Paso, Texas	855	\$1,624.50
4-7-56	839	Great A & P Tea Company North Hawthorne, New Jersey	1,025	1,958.01
4-7-56	841	A. Arena & Company, Ltd. Chicago, Illinois	1,025	1,955.39
4-7-56	842	National Tea Company Chicago, Illinois	1,025	1,931.84
4-7-56	846	National Tea Company Chicago, Illinois	1,025	1,960.07
4-7-56	843	Great A & P Tea Company Onleyville, Rhode Island	1,025	1,964.46
4-7-56	844	Kroger Company Cincinnati, Ohio	1,025	1,967.43
4-7-56	845	A. Arena & Company, Ltd. Roseville, California	1,025	2,011.91
4-7-56	847	Great A & P Tea Company Onleyville, Rhode Island	1,025	1,954.62
4-7-56	863	Safeway Stores, Inc. Spokane, Washington	1,025	1,896.25
4-7-56	860	A. Arena & Company, Ltd. Roseville, California	1,025	1,912.50
4-7-56	854	Great A & P Tea Company Harlem River, New York	1,025	1,953.28
4-7-56	852	Kroger Company Detroit, Michigan	1,025	1,955.32
4-7-56	850	National Tea Company Chicago, Illinois	1,025	2,107.03

Date of Shipment	Invoice No.	Consignee and Destination	No. of Cartons	Sales Price F.O.B. Lindsay
4-7-56	853	Great A & P Tea Company Onleyville, Rhode Island	1,025	\$1,950.59
4-7-56	851	A. Arena & Company, Ltd. Chicago, Illinois	1,025	1,801.57
4-7-56	849	National Tea Company Chicago, Illinois	1,025	1,958.05
4-7-56	856	National Tea Company Chicago, Illinois	1,036	1,981.93
4-7-56	855	National Tea Company Chicago, Illinois	1,025	1,958.05
4-7-56	859	Great A & P Tea Company Onleyville, Rhode Island	1,025	1,952.60
4-7-56	858	Kroger Company Detroit, Michigan	1,025	1,955.32
4-7-56	857	Great A & P Tea Company Mineola Garden City, N.Y.	1,025	1,353.85
4-7-56	848	Great A & P Tea Company Waverly, New Jersey	1,025	1,953.96

Shipments in Excess of Allotment Made by Lo Bue Through
April 8, 1956, During Weekly Period Covered by Navel Orange
Regulation No. 82

4-8-56	876	National Tea Company Chicago, Illinois	883	\$1,686.53
4-8-56	877	A. Arena & Company, Inc. Chicago, Illinois	1,025	1,954.10
4-8-56	878	A. Arena & Company, Inc. Chicago, Illinois	1,025	2,211.58

AIR MAIL - REGISTERED
RETURN RECEIPT
REQUESTED

REGISTERED

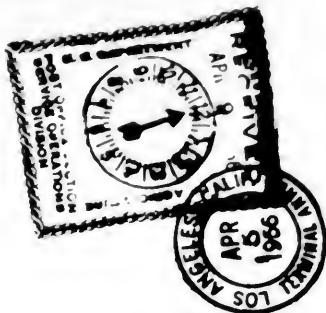
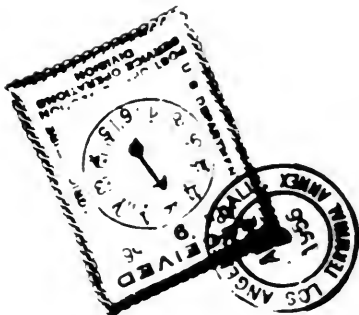
97021 22-21

RETURN RECEIPT REQUESTED

Hearing Clerk,
Office of the Secretary,
U. S. Department of Agriculture,
Washington 25, D. C.

AIR MAIL

APPENDIX B



Appendix C

Washington, D. C.

August 28, 1957

I, Christopher C. Robinson, Postal Clerk, United States Post Office, Washington, D. C., make the following statement, freely and voluntarily, to Henry P. Reis-El Bara, who has identified himself to me as a Special Agent of the Internal Audit Division, Agricultural Marketing Service, U. S. Dept. of Agriculture.

I am 38 years old, reside at 639 Montello Ave., N.E., Washington, D. C. and have been employed with the United States Post Office Department for approximately ten (10) years.

The United States Post Office records reveal that on April 7, 1956, I prepared a United States Postal Form 3877 containing forty (40) pieces of registered mail which I listed on the form. My signature along with the time I completed the form appears on the bottom of the second of two (2) 3877 forms. At the time Agent Reis-El Bara showed me the photostat of the 3877 form I stated there must be another form with that one because it did not contain the lock and rotary number which is mandatory, nor did it contain my signature, the total pieces or the time of completion of the form. The Post Office records will reveal there were in fact two (2) sheets with the one mail bag of Registered Mail, the second a continuation of the first.

The afternoon mail for the Agriculture Dept.

leaves the United States Post Office at approximately 2:30 to 3:00 p.m. daily except Saturday and Sunday when there is no delivery. Mail arriving at the U. S. Post Office for the Agriculture Dept. after approximately 2:00 p.m. on Friday is held over until the first delivery on Monday morning.

The photostat of the registered envelope, Reg. #97021, bearing the Washington, D. C., date stamp of 6 April 1956, therefore would have to have arrived sometime Friday after the afternoon mail had left for delivery to the Dept. of Agriculture. The mail is put in the various bins here in the post office for delivery to the addressees and over the weekend is prepared for delivery on Monday. Registered Mail is prepared first so it will go out on the first delivery on Monday. I wrote up the 3877 form containing registered letter #97021 on Saturday evening completing the form at 10:45 p. m. as indicated by my signature and the time of completion. I then placed the mail and the form 3877 in the mail bag and locked it with lock number 48532, rotary number 203. This mail then remained in the United States Post Office until it was delivered to the Department of Agriculture on Monday morning.

I have read the above statement consisting of two (2) typewritten pages, have had the opportunity to make any additions or corrections and the entire statement is true and correct to the best of my knowledge.

/s/ CHRISTOPHER C.
ROBINSON.

Witness:

/s/ HENRY P. REIS-EL BARA,
Special Agent, Internal Audit Division, Agricultural
Marketing Service, U. S. Department of
Agriculture, Washington 25, D. C.

Appendix D

Washington, D. C.

August 29, 1957

I, Paul Lewis, Postal Clerk, Agriculture Post Office, make the following statement, freely and voluntarily, to Henry P. Reis-El Bara, who has identified himself to me as a Special Agent of the Internal Audit Division, Agricultural Marketing Service, U. S. Department of Agriculture.

The large volume of mail handled each day makes it impossible for me to remember any one particular letter but from the photostats shown me, by Special Agent Reis-El Bara, of U. S. Post Office Form 3877 dated April 7, 1956, and U. S. Department of Agriculture P&O Form 4 dated April 9, 1956, at 11:51 a.m. I can state positively I processed the mail bag containing registered letter #97021 addressed to the Hearing Clerk on April 9, 1956. My initials appear on the U. S. Post Office Form 3877 on the right hand side of the form where the date and the time are stamped and on the left hand side of the Mail Receipt P&O Form 4 where the date

and time are stamped. This means I opened the mail bag containing that batch of registered letters and checked the contents against the form. The photostat of the U. S. Post Office Form 3877 dated April 7, 1956, would appear to be page one of two or more pages because it does not contain the lock and rotary number which must be on each form to identify the bag with its contents.

When I open a bag of registered mail I check the U. S. Post Office Form 3877 against the mail and when all is in order I time and date stamp the form at that time. The mail is then sorted out for filing and date and time stamped before being placed in the proper Out Box for delivery. Registered letter #97021 bears the U. S. Agriculture Received Stamped dated April 9, 1956, at approximately 12:00 Noon. This means I stamped that letter and placed it in the Out Box at that time. This particular stamp is a hand stamp and not an automatic time clock stamp and is used on thick or bulky pieces of mail which will not fit in the automatic time clock stamp or when I have the mail laid out on the table and want to rapidly stamp the incoming mail.

After all the mail has been sorted and placed in the proper Out Boxes the Mail Receipt for each box is made out. The photostat of Mail Receipt P&O Form 4 dated April 9, 1956, 11:51 a.m. indicates that was the thirty-fourth (34) such form made out that day as shown by the number 34 in the

uper right hand corner. My initials on that form indicate I listed six (6) pieces of mail—2 Reg. and 4 Certified registered for the Secretary of Records Office of which one was registered letter #97021 for the Hearing Clerk. After completing the form I time and date stamped it and placed it in the Out Box with the Mail.

I have read the above statement consisting of this and two other typewritten pages, have had the opportunity to make any additions or corrections and the statement is true and correct to the best of my knowledge.

/s/ PAUL LEWIS.

Witness:

HENRY P. REIS-EL BARA,

Special Agent, Internal Audit Division, Agriculture Marketing Service, U. S. Department of Agriculture, Washington, D. C.

Appendix E

Washington, D. C.

August 29, 1957

I, Nellie C. Chase, Clerk, Hearing Clerks' Section of the Office of the Secretary, U. S. Department of Agriculture, make the following statement, freely and voluntarily, to Henry P. Reis-El Bara, who has identified himself to me as a Special Agent of the

Internal Audit Division, Agricultural Marketing Service, U. S. Department of Agriculture.

Our files reflect a letter from G. V. Weikert and a petition from Lo Bue Bros., Lindsay, California, was received on April 9, 1956. Photostats of a Mail Receipt shown to me by the Agent reflect my initials after Miss Clarke's signature indicating that on April 9, 1956, at approximately 1:20 p.m., I signed for a registered letter delivered to this section by the Secretary's Records Office.

The registered envelope bearing registry number 97021 has Return Receipt Requested, stamped on it. When registered letters have this stamped on them, either I or Miss Clarke sign the receipt and return it to the sender. We receive so many registered letters without seeing the receipt it would be impossible to determine which one of us signed the return receipt.

After I receive the mail in the usual course of business, it is then placed on Miss Clarke's desk where it is stamped with a date time stamp. The petition from Lo Bue Bros., along with the letter from G. V. Weikert, were stamped by Miss Clarke on April 9, 1956, at approximately 2:00 p.m. according to the stamp in the upper right hand corner.

I have read the above statement consisting of this and one other typewritten page, have been given the opportunity to make any additions or correc-

tions and the statement is true and correct to the best of my knowledge.

/s/ NELLIE C. CHASE.

Witness:

/s/ HENRY P. REIS-EL BARA

Special Agent, Internal Audit Division, Agriculture
Marketing Service, U. S. Department of Agriculture,
Washington, D. C.

Appendix F

Washington, D. C.

August 29, 1957

I, Agnes B. Clarke, Hearing Clerk, Office of the Secretary, U. S. Department of Agriculture, make the following statement, freely and voluntarily, to Henry P. Reis-El Bara, who has identified himself to me as a Special Agent of the Internal Audit Division, Agriculture Marketing Service, U. S. Department of Agriculture.

My files reflect the Hearing Clerk's Office received a registered letter from G. V. Weikert along with a petition from Lo Bue, Lindsay, California, on April 9, 1956. The date time stamp in the upper right-hand corner indicates it reached my desk at approximately 2:00 p.m. on April 9, 1956. When petitions are filed with the Hearing Clerk they are always dated upon receipt. The large volume of mail

received by this section makes it impossible to recall a particular letter or petition so each is stamped as it is received.

We only sign for registered mail. In the case of registered mail return receipt requested, either Mrs. Chase or I sign for the return receipt at the time of delivery. Again the large volume of mail makes it impossible to recall which one of us has signed for a particular letter without having the receipt to check the signature. The photostat the Agent has shown me of the United States Department of Agriculture, Mail Receipt covering registered letter No. 97021 was signed by Mrs. Chase for me as shown by her initials after my name.

I have read the above statement consisting of this and one other typewritten page, have been given the opportunity to make any additions or corrections and the statement is true and correct to the best of my knowledge.

/s/ AGNES B. CLARKE.

Witness:

/s/ HENRY P. REIS-EL BARA,
Special Agent, Internal Audit Division, Agriculture
Marketing Service, U. S. Department of Agriculture,
Washington, D. C.

United States Department of Agriculture
Before the Secretary of Agriculture
AMA Docket No. 14-1

In the Matter of the Petition of:

LO BUE BROS., a Co-partnership,
Petitioner.

To the Honorable the Secretary of Agriculture of
the United States:

The above-named petitioner, pursuant to the provisions of Subsection (15)(A) of Section 8c of the Agricultural Adjustment Act of 1933, as amended, and as re-enacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 608c (15)(A)), hereinafter called "the Act," respectfully represents:

I.

Petitioner, Lo Bue Bros., is a co-partnership composed of Mario Lo Bue, Joseph Lo Bue, and Fred Lo Bue with its principal office and place of business located at 201 Sweetbriar, Lindsay, California.

II.

Petitioner complains of the "Order Regulating the Handling of Navel Oranges Grown in the State of Arizona and a Designated Part of California," designated "Order No. 14," issued by the Secretary of Agriculture August 5, 1953, effective September 22, 1953, and particularly of the obligations imposed upon petitioner in connection therewith, and alleges that each

Appendix G

William G. Sparkman if called, sworn, and examined as a witness in this case would testify:

He is and was on April 9, 1956, a postal clerk in the Agriculture Post Office, U. S. Department of Agriculture, Washington, D. C. He was at that time authorized to sign for and receive registered mail for that Post Office. He has no independent recollection of the specific bag of mail involved in this case, but recognizes his signature on U. S. Postal Form WPO 1115, copy of which is attached hereto in Appendix H, dated April 9, 1956. The entries on the form mean that he received, and signed for, ten (10) bags of registered mail at 7:45 a.m. on that date, and one of those bags was one with lock number 48532-203. [41]

4

100

People apply for registration
of the arising jurisdiction



APPENDIX

4.

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—Monsieur le Ministre, j'ai l'honneur de vous adresser ci-joint le rapport que vous m'avez demandé par votre lettre du 15 courant.

BURCHARDT are not required on international registered mail.

hereby applies for registration of the articles described below

Address

da-48537-202

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DATE _____

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head of post office -

Johns

Plans of meeting

3

APPENDIX

185

223

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF PLANT AND OPERATIONS
SERVICE OPERATIONS DIVISION

No. 34

MAIL RECEIPT

Received
Department Post Office

☐ Image
Handwritten signature
* *Handwritten signature*

To: *Sec. Rec.*
(Name of Office)

(Time Stamp)

Handwritten initials

RECEIVED BY	ADDRESS	POSTAGE	SENDER'S NAME
#784392	Personnel		Civil Service Com.
598353	12884	1st class 8c	Dpt of Agr
97021	Personnel	for reply only	A. V. Williams
*24726	A.A. Clark	Chicago, Ill	Civil Service
*791798	Will Civil Service Comm.	Washington, D.C.	A. C. Clark
*159871	22	Post Office	C. J. Fisher

Received by Department Post Office by *Handwritten signature*

RECEIVED BY: ☒ RECEIVED BY AGENT BY: *Handwritten signature* TIME RECEIVED: *Handwritten*

FORWARDED TO: *Handwritten signature*

RECEIVED BY: *Handwritten* TIME RECEIVED: *Handwritten*

Date 12.15

REGISTERED MATTER DELIVERED BY
OFFICIAL MAIL MESSENGER SERVICE

No. 7

Post No.	Letter and Receipt or Address No.	Delivered on Account	Signature of Approved Agent
V	69208-243	Apie.	
L	49189-158		
N	9960-129		
V	79000-91		
L	22402-538		
L	48532-203		
M	9243-444		
A	59012-647		
V	38254-42		
L	30271-281		
A	7368-144	Answer	
A	58397-516		
A	85485-409		
A	26482-503		
V	86416-223		
N	7303-22		
	274	Printed P.O. bill.	
	275		
A	7530-148	Cont. hand	
V	27347-440		
	37	20 pages, M. G.	
	55172-143	notes	

Delivered 22 articles from Registry Section

[Endorsed]: Filed October 11, 1957.

APP 1011

H

Time

Man

10

10



[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION OF FACTS;
AND ADDITIONAL ISSUE

Whereas, the United States of America has filed a complaint in the United States District Court, Southern District of California, Northern Division, seeking to recover a statutory forfeiture from the defendants under the provisions of Section 8a(5) of the Agricultural Marketing Agreement Act of 1937; (7 U.S.C. § 608a(5)) and

Whereas, plaintiff and defendants have heretofore entered into and filed a stipulation of facts and issues in this case; and

Whereas, defendants have filed their answer and it appears [44] that there are additional matters of fact that can be agreed upon,

Now, Therefore, It Is Hereby Stipulated by and between the above-named parties, by and through their respective counsel, Laughlin E. Waters, United States Attorney, Richard A. Lavine, Chief of the Civil Division, and Jordan A. Dreifus, Assistant United States Attorney, attorneys for the plaintiff, and G. V. Weikert, attorney for the defendants, as follows:

1. That Neal O'Donnell was at all times material, employed as a Postal Clerk, United States Post Office, Washington, D. C.; that if he were called, sworn, and examined as a witness in this

case he would testify substantially as appears in the statement dated October 7, 1957, a copy of which is attached hereto as Appendix 1.

2. That Christopher C. Robinson was at all times material, employed as a Postal Clerk, United States Post Office, Washington, D. C.; that if he were called, sworn, and examined as a witness in this case he would testify substantially as appears in a statement dated October 7, 1957, a copy of which is attached hereto as Appendix 2.

3. That William H. Tatum, Sr., was at all times material, employed as a mail carrier, United States Post Office, Washington, D. C.; that if he were called, sworn, and examined as a witness in this case he would testify substantially as appears in a statement dated October 8, 1957, a copy of which is attached hereto as Appendix 3.

4. That Paul Lewis was at all times material, employed [45] as a Postal Clerk, Agricultural Post Office, Washington, D. C.; that if he were called, sworn, and examined as a witness in this case he would testify substantially as appears in a statement dated October 7, 1957, a copy of which is attached hereto as Appendix 4.

5. That William G. Sparkman was at all times material, employed as a Postal Clerk, Agricultural Post Office, Washington, D. C.; that if he were called, sworn, and examined as a witness in this case he would testify substantially as appears in a

statement dated October 10, 1957, a copy of which is attached hereto as Appendix 5.

6. That Nellie C. Chase, was at all times material, employed as a Clerk, Office of the Hearing Clerk, Department of Agriculture, Washington, D. C.; that if she were called, sworn, and examined as a witness in this case she would testify substantially as appears in a statement dated October 7, 1957, a copy of which is attached hereto as Appendix 6.

7. That Agnes B. Clarke, was at all times material, employed as Hearing Clerk, Office of the Hearing Clerk, Department of Agriculture, Washington, D. C.; that if she were called, sworn, and examined as a witness in this case she would testify substantially as appears in a statement dated October 7, 1957, a copy of which is attached hereto as Appendix 7.

8. That the record of the administrative proceeding on the petition filed by Lo Bue Brothers under 608c(15)(A) which [46] is on file with the Hearing Clerk, United States Department of Agriculture, including the transcript of the testimony offered at such hearing, is the official record of such proceeding and is in all respects authentic.

9. The parties expressly reserve the right to object to any and all of the foregoing stipulated facts on the grounds of irrelevancy or immateriality, and shall be free to argue the legal effect or conclusions that can be drawn from them.

Additional Issue of Law and Fact

Whether the defendants, or any of them, violated Order No. 14, or exceeded any purported allotments or quotas thereunder, wilfully or at all.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division;

JORDAN A. DREIFUS,
Assistant U. S. Attorney;

JOHN S. GRIFFIN,
Attorney, Office of the General Counsel, of Counsel,
U. S. Department of Agriculture;

By /s/ JORDAN A. DREIFUS,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

/s/ G. V. WEIKERT,
Attorney for Defendants. [47]

Appendix No. 1

Washington, D.C.,
October 7, 1957

I, Neal D. O'Donnell, Postal Clerk, United States Post Office, Massachusetts Ave. and 1st Street, N.W., Washington, D.C., make the following statement,

freely and voluntarily, to Henry P. Reis-El Bara, who has identified himself to me as a Special Agent of the Internal Audit Division, Agricultural Marketing Service, U. S. Department of Agriculture.

I checked the United States Postal Records and made them available to Agent Reis-El Bara. The records reflect as I informed the Agent the registered letter bearing registered number 97021 was delivered to the Agriculture Post Office, U. S. Department of Agriculture at 7:45 a.m., April 9, 1956, along with 39 other pieces of registered matter. Registered letter 97021 was in a bag containing lock number 48532, rotary number 203 at the time it was delivered to the Agriculture Post Office. If I were to appear as a witness, my oral statement would contain in substance the same information I related to Agent Reis-El Bara in my conversation with him on August 28, 1957.

/s/ NEAL D. O'DONNELL.

Witness:

/s/ HENRY P. REIS-EL BARA,
Special Agent, Internal Audit Div., Agricultural
Marketing Ser., U. S. Department of Agriculture,
Washington, D. C. [48]

Appendix No. 2

Washington, D.C.,
October 7, 1957

I, Christopher C. Robinson, Postal Clerk, United States Post Office, Washington, D. C., make the following statement, freely and voluntarily, to Henry P. Reis-El Bara, who has identified himself to me as a Special Agent of the Internal Audit Division, Agricultural Marketing Service, U. S. Department of Agriculture.

On April 7, 1956, the day in which the United States Post Office Records revealed I processed registered letter number 97021, I was performing my assigned duties in the registered matter section of the United States Post Office which is located at Massachusetts Ave. and 1st Street, N.E., Washington, D. C. If I were called to testify, my oral statement would be in substance as that which was given to Special Agent Reis-El Bara in a written statement on August 28, 1957.

/s/ CHRISTOPHER C. ROBINSON.

Witness:

/s/ HENRY P. REIS-EL BARA,
Special Agent, Internal Audit Div., Agricultural
Marketing Ser., U. S. Department of Agriculture,
Washington, D. C. [49]

Appendix No. 3

Anacostia, Washington 20, D.C.,
October 8, 1957.

I, William H. Tatum, Sr., Mail Carrier, United States Post Office, 1217 Good Hope Road, South East, Anacostia, Washington 20, D. C., make the following statement, freely and voluntarily, to Henry P. Reis-El Bara who has identified himself to me as a Special Agent of the Internal Audit Division, Agricultural Marketing Service, U. S. Department of Agriculture.

The photostat of the United States Post Office form WPO 1115 dated April 9th, 1956, shown me by Agent Reis-El Bara indicates that on that date I delivered ten (10) bags of Registered Matter to the Department of Agriculture Post Office at 7:45 a.m.

At that time I was assigned to the Official Mail Section, Main Post Office, Massachusetts Ave., North Capitol and 1st Street, N.E. In this capacity I drove a mail truck from [50] the post office to various Governmental Agencies in the Washington Area.

I have no idea as to the contents of the locked mail bags. They were delivered to the Agriculture Post Office where William Sparkman signed for the 10 bags of Registered Matter. This is the only contact I had with the mail bags—to deliver them to the Agriculture Post Office.

If I were called to testify, my oral statement in

substance would be the same as given to Agent Reis-El Bara the 8th day of October, 1957.

I have read the above statement consisting of three handwritten pages, been given the opportunity [51] to make any corrections or changes and the statement is true to the best of my knowledge.

/s/ WILLIAM H. TATUM, SR.

Witness:

/s/ HENRY P. REIS-EL BARA,
Special Agent, Internal Audit Div., Agricultural
Marketing Ser., U. S. Department of Agriculture,
Washington, D. C. [52]

Appendix No. 4

Washington, D.C.,
October 7, 1957.

I, Paul Lewis, Postal Clerk, Agriculture Post Office, make the following statement, freely and voluntarily, to Henry P. Reis-El Bara, who has identified himself to me as a Special Agent of the Internal Audit Division, Agricultural Marketing Service, U. S. Department of Agriculture.

On April 9, 1956, the day in which the Agriculture Post Office Records revealed I processed a registered bag of mail which contained registered letter number 97021 I was performing my assigned duties in the Agriculture Post Office which is located in room

0409, South Building, Department of Agriculture, Independence Ave. and 12th Street, S.W., Washington, D. C. If I were called to testify, my oral statement would be in substance as that which was given to Special Agent Reis-El Bara in a written statement on August 29, 1957.

/s/ PAUL LEWIS.

Witness:

/s/ HENRY P. REIS-EL BARA,
Special Agent, Internal Audit Div., Agricultural
Marketing Ser., U. S. Department of Agriculture,
Washington, D. C. [53]

Appendix No. 5

Washington, D.C.,
October 10, 1957.

I, William G. Sparkman, Postal Clerk, Agriculture Post Office, Room 0409, South Building, U. S. Department of Agriculture, Independence Ave., between 12 and 14th Streets, S.W., Washington, D. C., make the following statement freely and voluntarily, to Henry P. Reis-El Bara, who has identified himself to me as a Special Agent of the Internal Audit Division, Agricultural Marketing Service, U. S. Department of Agriculture.

The Agriculture Post Office records revealed that on Monday, April 9, 1956, at 7:45 a.m. I signed a United States Post Office Form WPO 1115 for ten

(10) bags of registered mail when it was delivered to the Agriculture Post Office from the United States Post Office. At the time I receipted for the ten (10) bags I was on duty in the Agriculture Post Office, Room 0409, located in the basement of the South Building, U. S. Department of Agriculture, Independence Ave., between 12th and 14th Streets S.W., Washington, D. C. The U. S. Postal Form WPO 1115 which accompanied the ten (10) bags of registered mail at the time of delivery reflects a bag with lock number 48532-203 was delivered at this time. I have no idea as to its contents as I merely signed for the bags and placed them in the mail security cage until they could be processed for delivery. This information I related to Agent Reis-El Bara in my conversation with him on August 29, 1957. If I were called to testify my oral statement would be in substance be as related to the agent on August 29, 1957.

/s/ WILLIAM G. SPARKMAN.

Witness:

/s/ HENRY P. REIS-EL BARA,
Special Agent, Internal Audit Div., Agricultural
Marketing Ser., U. S. Department of Agriculture,
Washington, D. C. [54]

Appendix No. 6

Washington, D.C.,
October 7, 1957.

I, Nellie C. Chase, Clerk, Mailing Clerk's Section of the office of the Secretary, U. S. Department of Agriculture, make the following statement, freely and voluntarily, to Henry P. Reis-El Bara, who has identified himself to me as a Special Agent of the Internal Audit Division, Agricultural Marketing Service, U. S. Department of Agriculture.

Our files reflect a letter from G. V. Weikert and a petition from Lo Bue Bros., Lindsay, California was received in this section at approximately 1:20 p.m. on April 9, 1956. On that date I was performing my assigned duties in room 112, Administrative Building, U. S. Department of Agriculture, Independence Ave. between 12th and 14th Streets, S.W., Washington, D. C. If I were called to testify my oral statement would be in substance as that which was given to Special Agent Reis-El Bara in a written statement on August 29, 1957.

/s/ NELLIE C. CHASE.

Witness:

/s/ HENRY P. REIS-EL BARA,
Special Agent, Internal Audit Div., Agricultural
Marketing Ser., U. S. Department of Agriculture,
Washington, D. C. [55]

Appendix No. 7

Washington, D.C.,
October 7, 1957.

I, Agnes B. Clarke, Hearing Clerk, Office of the Secretary, U. S. Department of Agriculture, make the following statement, freely and voluntarily, to Henry P. Reis-El Bara, who has identified himself to me as a Special Agent of the Internal Audit Division, Agricultural Marketing Service, U. S. Department of Agriculture.

My files reflect that at approximately 2:00 p.m., April 9, 1956, a petition from Lo Bue Bros, Lindsay, California, along with a letter from G. V. Weikert reached my desk which is located in Room 112, Administrative Building, U. S. Department of Agriculture, Independence Ave., between 12th and 14th Streets, S.W., Washington, D.C. On that date I was performing my assigned duties as Hearing Clerk and processed the petition from Lo Bue Bros. in the same manner as any other petition. If I were called to testify, my oral statement would be in substance as that which was given to Special Agent Reis-El Bara in a written statement on August 29, 1957.

/s/ AGNES B. CLARKE.

Witness:

/s/ HENRY P. REIS-EL BARA,
Special Agent, Internal Audit Div., Agricultural
Marketing Ser., U. S. Department of Agriculture,
Washington, D. C.

[Endorsed]: Filed October 30, 1957. [56]

[Title of District Court and Cause.]

MEMORANDUM DECISION

The above-entitled cause came on for trial before the Court sitting without a jury, on March 11, 1958. The plaintiff was represented by Laughlin E. Waters, United States Attorney, Jordon A. Dreifus, Assistant United States Attorney, appearing, and John S. Griffin, Attorney for the U. S. Department of Agriculture, of counsel. The defendants were represented by G. V. Weikert, Esq.

Pretrial procedures resulted in the filing of stipulations of fact in which the parties reached agreement on most of the material facts. The evidence consisted of the stipulations of fact, and oral and documentary evidence.

It was stipulated that on April 5, 1956, Lo Bue Brothers mailed by registered air mail from Los Angeles, California, to the Hearing Clerk, Office of the Secretary, [166] Department of Agriculture, Washington, D. C., a petition for relief from Order No. 14 (and particularly from the obligations imposed upon the defendants in connection therewith) pursuant to the provisions of Section 608(c)(15)(a) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 608(c)(15)(a).

The petition arrived in the Washington, D. C. Post Office about 2:00 p.m. on April 6, 1956.

The hearing on the petition was subsequently held and on December 3, 1956, a decision on the merits,

adverse to the petitioner, was made. Although requested to do so, the Judicial Officer of the Department of Agriculture refused to make any finding on whether or not the petition was filed and prosecuted in good faith and not for purposes of delay.

It was further stipulated that subsequent to April 6, 1956, and prior to April 9, 1956, Lo Bue Brothers handled 26,349 cartons of navel oranges in excess of their allotment, if such allotment were legally binding upon them, and that Lo Bue Brothers ultimately received the gross sum of approximately \$49,870.74 from the sale of such excess.

The plaintiff seeks to recover a forfeiture from the defendants pursuant to Section 608(a)(5) of the Agricultural Marketing Agreement Act of 1937. This section provides that any person wilfully exceeding any quota or allotment fixed for him, shall forfeit to the United States a sum equal to three times the current market value of such excess, and the forfeiture shall be recovered in a civil suit brought in the name of the United States.

The defendants contend that under the evidence in this case, the acts of the defendants in exceeding the quota or allotment made to them, were not wilful and further that they are entitled to the immunity provided by Section 608(c) [167] (14) of the Agricultural Marketing Agreement Act of 1937. This section reads as follows:

Any handler subject to an order issued under this section, or any officer, director, agent or

employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than \$50 or more than \$500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: Provided, that if the court finds that a petition pursuant to subsection 15 of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

I am satisfied under the law and the evidence that the petition for relief filed by Lo Bue Brothers pursuant to the provisions of Section 608(c)(15)(a) was not filed in the office of the Secretary of Agriculture, Washington, D. C., until in the afternoon of April 9, 1956.

Counsel has called to my attention three decisions which have construed the proviso in Section 608(c)(14). These cases are U. S. vs. William S. Wright, No. 3036-H-Civil; U. S. vs. Alexander Chaskin, No. 3065 O.C.-Civil; and U. S. vs. A. Levy & J. Zentner Co., No. 3081-H-Civil.

All of these cases are from the Southern District of California, and all were decided by the Honorable Harry A. Hollzer, now deceased. In all of these cases, the government sought to recover civil penalties and forfeitures under Section 608(a)(5) for orange shipments in excess of allotments during the pendency of petitions filed under Section 608(c)(15)(a). In all three cases the Court held that the immunity [168] provided by the proviso of Section 608(c)(14) extended to civil penalties as well as criminal penalties. No appeal was taken by the United States from any of those decisions. In the Wright case, the following conclusions of law were adopted by the Court:

“That the provisions of the statute under which these actions are being prosecuted are penal in character and therefore must be construed strictly.

“Since a petition pursuant to Subsection 15, Section 608(c) Title 7 U.S.C. was filed and prosecuted by defendant, William S. Wright, in good faith and not for delay, no penalty can be imposed and no forfeitures can be recovered against said defendant William S. Wright for any of the violations involved herein.”

Similar conclusions of law were filed in the Chaskin case. In the Levy case, the following conclusions of law were adopted:

“The defendant Vincent J. Squillante, having failed to file a petition pursuant to said subsec-

tion (15) of Sec. 608(c) Title 7 U.S.C. and having aided and abetted in the commission of the violation described herein, is liable on account thereof. Said statute is penal in its nature and must be strictly construed.

“The plaintiff is entitled to recover against the defendant Vincent J. Squillante, the statutory forfeitures provided in Sec. 608(a) Title 7, U.S.C. subsection 5.”

In view of the conclusion I have reached, it is unnecessary for me to pass upon the soundness of Judge Hollzer's decisions.

The question remaining is whether or not Lo Bue Brothers wilfully exceeded the quota or allotment fixed for them. In order to resolve this question, some background is necessary. [169]

Counsel for the defendants, Lo Bue Brothers, in the instant case, G. V. Weikert, represented the defendants in each of the cases decided by Judge Hollzer, referred to above. Mr. Weikert testified that he had been practicing law in Los Angeles continuously since 1926; that during the last twenty years his work, to a very considerable extent, had been with the activities of the Department of Agriculture, and that he had specialized in agricultural marketing and the fruit and produce business and its problems generally.

He further testified that over the years he had prepared and filed quite a number of “15-A” petitions for various shippers, and that it had been his

experience that petitions mailed in Los Angeles were delivered in Washington the following day, and that he had proceeded on the assumption that such petitions were received and filed the day after they were mailed. The "15-A" petition filed for Lo Bue Brothers was the first occasion in which the government had ever raised any question as to the date of filing. He further stated that sometime in March, 1956, he had been consulted by the sales manager of the defendants, William Woodall, and that Mr. Woodall said that the normal shipping season for navel oranges in Central California ends about April 1st, and that the Navel Orange Administrative Committee was proposing to restrict shipments for about ten weeks beyond that date. Fruit was deteriorating and dropping and would become worthless unless the restrictions could be removed. Mr. Woodall felt that the restriction was discriminatory against Central California growers because the Committee was proposing to restrict shipments of Southern California oranges no more than two weeks beyond their historical life.

Mr. Weikert then suggested the filing of a petition under Section 15(a) of Section 608 of Title 7 U.S.C. and he [170] advised Mr. Woodall that when the petition was filed in good faith, the restriction on shipments would be suspended until there was a decision on the petition, and that during that period the petitioner was exempt from penalties prescribed by the Act, until he might be subsequently enjoined from further shipments.

Mr. Weikert further testified that he told Mr. Woodall that in the only cases he knew about, which were cases decided in this court in 1944, (the Wright and Chaskin cases above noted) the immunity provided by the statute had been construed to extend to civil penalties as well as criminal penalties, and that once a 15(a) petition was filed in good faith, the petitioner was free to disregard allotments unless and until he was enjoined from further shipments.

Mr. Woodall returned to Lindsay to discuss the advisability of filing such petition with Lo Bue Brothers, and some days later, Mr. Woodall and Mr. Mario Lo Bue, one of the partners of the defendant partnership, by the use of extension telephones, called Mr. Weikert and it was agreed by the three parties to the conversation that a petition pursuant to the provisions of Subsection 15(a) of Section 608, Title 7, U.S.C. should be prepared and filed. Mr. Weikert then prepared the petition and Mr. Lo Bue went to Los Angeles and signed it, and immediately thereafter he returned to Lindsay, leaving the petition with Mr. Weikert, who mailed it on April 5, 1956, by registered air mail to the Department of Agriculture in Washington. On April 6, 1956, late in the afternoon, Mr. Weikert telephoned Mr. Lo Bue, and with Mr. Woodall on the extension telephone, he told them that "by now the petition would be on file with the Secretary of Agriculture, and if they had fruit to ship in excess of their allotment, they could begin the next day to make such shipments and could continue unless and until [171] they

received an injunction or restraining order stopping them.”

The testimony of Mario Lo Bue and William Woodall was substantially the same as the testimony of Mr. Weikert.

Mr. Wilford S. Beard, Special Agent, Agricultural Marketing Service, was called by the plaintiff, and he testified that he had talked to Mr. Mario Lo Bue, one of the defendants, on April 10, 1956, and that Mr. Lo Bue told him that he had engaged an attorney, Mr. Weikert, and that a petition had been signed, and that Mr. Weikert had advised him that after Saturday, April 7, 1956, the defendants would be free to ship oranges in excess of their allotment until restrained by order of the Court. He testified that Mr. Lo Bue told him they were advised not to ship before the petition was filed, but they were free to ship on Saturday, April 7, 1956.

On April 12, 1956, Mr. Beard again called at the office of Lo Bue Brothers, and talked with Mr. Mario Lo Bue again. On that date, Mr. Lo Bue repeated the advice he had received from Mr. Weikert, and said that he had signed the petition on behalf of the partnership. Mr. Beard served Mr. Lo Bue with a restraining order on that date.

Counsel for the plaintiff state that the three cases above noted, decided by Judge Hollzer, are the only cases which have construed the proviso contained in Section 608(c)(14). My research has failed to dis-

close any other decisions on the subject rendered by any United States court.

In *Nicastro vs. United States*, 206 Fed. 2d 89 (Tenth Circuit 1953) the court said, in connection with a violation of the Price Control Act, "The word 'wilful' as used in the statute means voluntary, knowing, and intentional, as distinguished from accidental, involuntary or unintentional. [172] It does not mean with an evil purpose or criminal intent. Practicable precaution against the occurrence of the violation * * * means the exercise of ordinary care and caution to avoid the commission of the wrong." In that case, the Court found the defendants liable because "they did not seek legal advice nor official interpretation" of the statute, and "clearly, their acts were wilful and they failed to take any practicable precautions against an occurrence of their violation."

In *United States vs. Illinois Central Railroad Co.* 303 U. S. 239, the Supreme Court in an action to recover a penalty for wilful failure to unload, feed and water cattle in transit, said: "(the word wilfully) often denotes that which is 'intentional, or knowing or voluntary, as distinguished from accidental' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right to so act' * * *"

It is my view that the acts of the defendants cannot be characterized as "wilful." They consulted a reputable attorney who had had extensive experience under laws administered by the Department of Agri-

culture. His advice was based upon the only Court decisions which had been rendered construing the proviso in Section 608(c)(14) of Title 7 U.S.C. His advice was in accordance with such decisions. Before shipments were made by the defendants in excess of their quota, the attorney telephoned them that the "15-A" petition had been filed, and that they could ship under the immunity provided by that same section. The defendants, in my opinion, in good faith, relied upon the advice and information furnished them by their attorney. The defendants, therefore, are entitled to have judgment entered in their favor. [173]

Counsel for the defendants is directed to prepare and lodge, in accordance with the rules of this Court, findings of fact, conclusions of law and form of judgment not inconsistent with the views herein expressed.

The Clerk of this Court is directed to forthwith mail copies of this memorandum to all counsel.

Dated: May 21, 1958.

/s/ GILBERT H. JERTBERG,
Judge, United States District
Court.

[Endorsed]: Filed May 21, 1958. [174]

[Title of District Court and Cause.]

MOTION FOR RECONSIDERATION
AND CLARIFICATION OF DECISION

Plaintiff has been served with defendants' Proposed Findings of Fact, Conclusions of Law and Judgment in accordance with local Rule 7. Those Findings, Conclusions and Judgment are returned for filing at the same time as this motion is filed.

One matter which has appeared both in the Court's Memorandum Decision and in the Findings of Fact, necessitates the plaintiff making this motion addressed to the substance of the decision in the case rather than merely to the form of Findings. Therefore this motion is made for reconsideration of the decision or in the alternative it is made to be treated as a motion to modify the Findings of Fact, Conclusions of Law and Judgment under Rule 59 Federal Rules of Civil Procedure as a motion after judgment. [193]

The point in need of reconsideration and/or clarification arises from the Court's Memorandum filed May 21, 1958 at Page 8, line 28, which reads:

"the defendants in my opinion in good faith relied upon the advice and information furnished them by their attorney."

However, on Page 4 of the Court's Memorandum the Court noted the problem which was raised in three previous cases as to whether the proviso of 7

USC 608 C (14) was a defense to this civil suit and at line 23 of that page the Court states:

“in view of the conclusion I have reached it is unnecessary for me to pass upon the soundness of Judge Hollzer’s decisions.”

“The question remaining is whether or not Lo Bue Brothers wilfully exceeded the quota or allotment fixed for them.”

In Paragraph XIX of the Proposed Findings of Fact, attorney for defendants has interpreted the Court’s Memorandum Decision to support the following Finding * * *

“and defendant Lo Bue Brothers acted in good faith in reliance thereon in filing said petition with the Secretary of Agriculture and in making said twenty-six shipments.”

It must first be noted that there are several possible alternatives the Court may have intended, each slightly different. The decision of the Court may have intended (1):

“that the defendants made the twenty-six shipments of oranges in good faith.”

or (2) for example: [194]

“that the defendants believed in good faith that a petition was on file at the proper time which petition was itself filed when eventually filed in good faith,”

or (3) for example:

“that the shipments were made in good faith and the petition when finally filed on April 9, 1956, was filed in good faith and not for delay,”

or (4) for example:

“that the twenty-six shipments were made in good faith and that defendants in good faith believed the petition was on file at the proper time prior to the shipments and that such petition was itself filed, when filed, in good faith and not for delay.”

Each of the four alternative examples may or may not amount to precisely the same thing. However, any one of them must involve an interpretation of the word “wilfully” which appears in 7 USC 608 a (5). It would appear that, as so interpreted, a defendant can show “non-wilfulness” by showing good faith and good intent in his acts. Such interpretation would appear to imply an affirmative defense which not only includes the terms of the proviso of 7 USC 608 c (14), but goes beyond it in holding mere belief that a petition is on file is a sufficient defense to “wilfulness.” (7 USC 608 c (14) would, itself, at least require that a petition be on file). This would appear as a matter of law to be inconsistent with the Court’s position taken on Page 4 of its Memorandum Decision as quoted above. [195]

Therefore, it is a motion of plaintiff that the Court reconsider its interpretation of the word “wilfully” so that a mere good faith belief on the

part of the defendants in the premises is insufficient to show an absence of "wilfulness," where the acts of defendants were not unconscious or inadvertent.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney;

JORDAN A. DREIFUS,
Assistant U. S. Attorney,

/s/ JORDAN A. DREIFUS,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

Lodged June 23, 1958. [196]

[Title of District Court and Cause.]

ORDER SETTLING FINDINGS OF FACT,
AND CONCLUSIONS OF LAW, AND
ORDER ON MOTION FOR RECONSIDER-
ATION AND CLARIFICATION OF DECISION

Defendants' proposed findings of fact, conclusions of law and judgment, plaintiff's objections thereto and plaintiff's motion for reconsideration and clarification of decision were lodged with the Clerk of this Court on June 23, 1958, and counsel for the

parties have stipulated to submit such matters without further argument,

Now, Therefore, the Court being fully advised in the premises, it is ordered:

1. That plaintiff's motion for reconsideration and clarification of decision be, and the same is hereby denied.

2. That plaintiff's objections to the proposed findings of fact be and they are sustained in the following particulars:

(a) That paragraph 15 appearing on page 8 of the proposed findings be modified by striking therefrom the [198] words "by the Hearing Clerk," appearing in line 16;

(b) That the word "correctly" appearing on line 27, in paragraph 18, page 9 of the proposed findings, be stricken and deleted therefrom.

(c) That the word "correctly" appearing in line 9, page 10, paragraph 18, of the proposed findings be stricken and deleted and the word "truthfully" be inserted in lieu thereof, and that the words "by him" be inserted on line 11, page 10, paragraph 18 of the proposed findings between the word "airmailed" and the word "from" appearing in line 11, page 10, paragraph 18 of the proposed findings.

It is further ordered that counsel for the defendants redraft and lodge with the Clerk of this Court proposed findings of fact and conclusions of law consistent with this order and that Rule 7(a) of the

Rules of the United States District Court of the Southern District of California requiring that the findings of fact, conclusions of law and the judgment shall consist of a single document be complied with.

The Clerk of this Court is directed to forthwith mail copies of these orders to all counsel.

Dated: July 9, 1958.

/s/ GILBERT H. JERTBERG,
Judge, United States District
Court.

[Endorsed]: Filed July 9, 1958. [199]

United States District Court, Southern District of
California, Northern Division

No. 1758—ND Civil

UNITED STATES OF AMERICA,
Plaintiff,
vs.

LO BUE BROTHERS, a Partnership, MARIO LO
BUE, FRED LO BUE and JOSEPH LO
BUE, Partners; and WILLIAM LUTHER
WOODALL,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT

The above-entitled cause came on for trial before the Court sitting without a jury, Honorable Gilbert

H. Jertberg, United States District Judge, presiding, on March 11, 1958. The plaintiff was represented by Laughlin E. Waters, United States Attorney, Jordan A. Dreifus, Assistant United States Attorney, appearing, and John S. Griffin, Esq., Attorney for the United States Department of Agriculture, of counsel. The defendants were represented by G. V. Weikert, Esq. Stipulations of facts were presented and received in evidence, and additional evidence, both oral and documentary, was introduced by the respective parties. The cause was argued by counsel and submitted to the Court for decision; and the Court having duly considered the same, and [200] being fully advised in the premises, now makes the following findings of fact and conclusions of law.

The Court finds:

I.

That this is a civil action brought by the United States of America, acting through the United States Attorney for the Southern District of California, at the request of the Secretary of Agriculture.

II.

That the defendants Mario Lo Bue, Fred Lo Bue and Joseph Lo Bue are partners operating as growers, handlers and shippers of navel oranges in Tulare County, California, which is in Central California in the area designated by the Secretary of Agriculture as Prorate District No. 1. At Lindsay, California, within this area they operate an orange packing establishment as a partnership under the trade name Lo Bue Brothers. William Luther

Woodall is the sales manager for Lo Bue Brothers and resides in Tulare County, California.

III.

That pursuant to Title 7, Section 608c of the United States Code, the Secretary of Agriculture issued Marketing Order No. 14, as amended, regulating the handling of navel oranges in the State of Arizona and a designated part of the State of California. The order became effective on October 22, 1953, and has remained constantly in effect since that date.

IV.

That four geographical prorate districts were established by the Secretary of Agriculture under Section 914.66 of Order No. 14 for the purpose of allotting shipments of oranges, as follows:

a. District 1 shall include that portion of the State of California between the 35th Parallel and the 37th Parallel, but shall exclude that portion of Kern County situated south [201] of the Kern River.

b. District 2 shall include that portion of the State of California which is south of the 35th Parallel, but shall exclude Imperial County, California, and that portion of Riverside County, California, situated south and east of White Water, California.

c. District 3 shall include the State of Arizona, Imperial County, California, and that portion of

Riverside County, California, situated south and east of White Water, California.

d. District 4 shall include that portion of Kern County, California, situated south of the Kern River.

V.

That the Secretary of Agriculture fixed the quantity of navel oranges grown in Prorate District 1, which could be handled during the weekly period covered by Navel Orange Regulation No. 81 commencing at 12:01 a.m. on April 1, and ending at 12:01 a.m. on April 8, 1956, at 277,200 cartons as set forth in the Federal Register, 21 F.R. 2037. During the weekly period covered by Navel Orange Regulation No. 82, commencing at 12:01 a.m. on April 8, and ending at 12:01 a.m. on April 15, 1956, the quantity fixed was 231,000 cartons as set forth in the Federal Register, 21 F.R. 2267.

VI.

That on October 18, 1955, Lo Bue Brothers filed with the Navel Orange Administrative Committee an application for a prorated base and allotment to ship navel oranges produced in Prorate District 1 during the 1955-56 marketing season. Based upon such application the committee determined that during the weekly period covered by Navel Orange Regulation No. 81 (12:01 a.m. April 1 to 12:01 a.m. April 8, 1956), Lo Bue Brothers had available for current shipment 3.7622 per cent of all navel oranges produced in District 1 which were available for shipment during such period. [202] Lo Bue Brothers was allotted 10,428 cartons of the 277,200 cartons

fixed by the Secretary of Agriculture as the quantity of navel oranges produced in Prorate District 1 that should be handled during such period.

VII.

That there was paid back to Lo Bue Brothers during the weekly regulation period covered by Navel Orange Regulation No. 81 (12:01 a.m. April 1 to 12:01 a.m. April 8, 1956), allotment totaling 892 cartons which had previously been loaned by Lo Bue Brothers. Under the provisions of Sections 914.55 and 914.57 of Order No. 14, Lo Bue Brothers was permitted to overship its base allotment of 10,428 cartons by 10% or 1,043 cartons, thus making a total of 12,363 cartons of navel oranges available to Lo Bue Brothers for shipment under said allotment during the weekly regulation period covered by Navel Orange Regulation No. 81.

VIII.

That the committee determined that based upon the application filed by Lo Bue Brothers for a pro-rate base and allotment Lo Bue Brothers had available for current shipment during the weekly period covered by Navel Orange Regulation No. 82 (12:01 a.m. April 8 to 12:01 a.m. April 15, 1956), 3.7671 per cent of all navel oranges produced in District 1 available for current shipment during such period. Lo Bue Brothers was allotted 8,702 cartons of the 231,000 cartons fixed by the Secretary as the quantity of navel oranges that should be handled in Prorate District 1 during such period.

IX.

That there was paid back to Lo Bue Brothers during weekly regulation period covered by Navel Orange Regulation No. 82 (12:01 a.m. April 8, to 12:01 a.m. April 15, 1956), allotment totaling 36 cartons which had previously been loaned by Lo Bue Brothers, making a total of 8,738 cartons of allotment issued or [203] paid back to Lo Bue Brothers during this period. Under Sections 914.55 and 914.57 of the order Lo Bue Brothers was required to deduct from the 8,738 cartons the 1,043 cartons of overshipment made during the weekly regulation period covered by Navel Orange Regulation No. 81 and to repay 262 cartons of allotment which it had previously borrowed from other handlers. After making these adjustments there remained available to Lo Bue Brothers for shipment under said allotment during the weekly regulation period covered by Navel Orange Regulation No. 82 allotment for 7,433 cartons of navel oranges.

X.

That during the weekly period covered by Navel Orange Regulation No. 81 (12:01 a.m. April 1 to 12:01 a.m. April 8, 1956), Lo Bue Brothers handled a total of 35,779 cartons of navel oranges produced in District 1, which was 23,416 cartons in excess of the allotment issued to it by the Navel Orange Administrative Committee for such period.

XI.

That during the weekly period covered by Navel Orange Regulation No. 82 (12:01 a.m. April 8 to

12:01 a.m. April 15, 1956), Lo Bue Brothers handled a total of 16,281 cartons of navel oranges produced in District 1 which was 2,933 cartons in excess of the allotment issued to it by the Navel Orange Administrative Committee, prior to April 9, 1956.

XII.

That the 26,349 cartons of navel oranges produced in Prorate District 1 which Lo Bue Brothers handled in excess of its allotments, prior to April 9, 1956, were shipped by Lo Bue Brothers in twenty-six separate shipments, twenty-three of which were made on April 7, 1956, and three on April 8, 1956. Two of said twenty-six shipments were sold by Lo Bue Brothers before April 9, 1956, for the gross selling price of \$3,520.75, and the balance of [204] said shipments were ultimately sold to various customers throughout the United States for the gross selling price of \$46,349.99.

XIII.

That the navel oranges comprising said twenty-six shipments belonged to fourteen or fifteen growers, and were handled by Lo Bue Brothers only as their agent. The net return to the growers of said fruit amounted to approximately \$29,000.00, the difference going to cover the cost of picking, hauling, handling, loading, shipping and selling the fruit, and the net sum of money received by Lo Bue Brothers as compensation for handling said fruit amounted to approximately \$1,800.00.

XIV.

That on April 5, 1956, Lo Bue Brothers mailed by registered air mail from Los Angeles, California to the Hearing Clerk, Office of the Secretary, U. S. Department of Agriculture, Washington 25, D. C., a petition for relief from Order No. 14, and particularly from the obligations imposed upon Lo Bue Brothers in connection therewith, pursuant to the provisions of Section 608c(15)(A) of the Agricultural Marketing Agreement Act of 1937. (7 U.S.C. 608c(15)(A)). This petition alleged that the normal shipping season for Central California navel oranges ends not later than April 1 of each year; that experience has proved that navel oranges from this district held beyond that date deteriorate so rapidly that they have little or no commercial value. Consequently, it has been the uniform practice prior to the navel shipping season of 1956 to terminate all restrictions on shipments from this district not later than March 25 of each year. It further alleged that in the year 1956, the Navel Orange Administrative Committee with the approval of the Secretary of Agriculture, reduced the quantities of Central California navel oranges permitted to be marketed week by week during the shipping season so far below normal that a large quantity of such oranges remained unharvested and unshipped at the end [205] of March, and said Committee indicated that it intended to continue to restrict weekly shipments of such oranges well into the month of May.

The petition further alleged that meanwhile, Central California navel oranges had come into competi-

tion with Southern California navel oranges, which generally mature later and have a much longer historical life. Market resistance to Central California fruit had been rapidly developing and by April 2, 1956, there was a differential of from 75c to \$1.00 per carton in favor of Southern California fruit due to its superior quality. Continuing deterioration of the Central California fruit would make it practically worthless after the week commencing April 2. Continuation of the Navel Orange Administrative Committee's policy of prorating shipments would have meant that said defendant would be able to ship only about 33 cars of navel oranges between April 2 and May 6, 1956, and would still have had approximately 40 cars left on that date. All such fruit unshipped after the week of April 2 would be a total loss.

It further alleged that the Navel Orange Administrative Committee had been operating with only one member representing Central California and that while so operating had extended and proposed to extend the marketing period for Central California fruit some 8 weeks beyond its historical life, while extending the marketing period for Southern California fruit less than two weeks past its historical life, thus discriminating in favor of Southern California growers, handlers, and shippers. That the action of the Navel Orange Administrative Committee, approved by the Secretary of Agriculture, in restricting the shipment of Central California navel oranges beyond their historical life was arbitrary,

capricious, unreasonable, inequitable, discriminatory, oppressive, unfair, and unjust, that the declared policy and purpose of the Act was thereby defeated, and that said defendant and its growers were thereby being deprived of their property [206] without due process of law, and their property had been and was thereby being taken, confiscated, and destroyed without compensation therefor, all in violation of the Fifth Amendment to the Constitution of the United States.

The petition prayed that the Secretary of Agriculture grant defendant Lo Bue Brothers, a hearing and that all restrictions upon the shipment of Central California navel oranges under Order No. 14 and all obligations imposed in connection therewith be terminated forthwith, or that the defendant be exempted therefrom, and that Order No. 14 be so amended or modified as to prevent a repetition in the future of the situation complained of, or that Order No. 14 be terminated and cancelled forthwith.

XV.

That said petition of defendant Lo Bue Brothers arrived in the Washington, D. C. Post Office about 2:00 p.m. on April 6, 1956, but was not filed in the office of the Secretary of Agriculture, Washington, D. C. until in the afternoon of April 9, 1956.

XVI.

That an answer to the petition of the petitioning defendant Lo Bue Brothers was filed by the Deputy Administrator, Agricultural Marketing Service,

United States Department of Agriculture on May 9, 1956, and a hearing was held on the petition on June 14, 1956, at Los Angeles, California, at which time the petitioning defendant Lo Bue Brothers appeared with counsel and introduced evidence both oral and documentary in support of said petition. Counsel for the Department of Agriculture introduced evidence both oral and documentary in opposition to said petition. Thereafter briefs were filed by both parties and on September 28, 1956, the Hearing Examiner issued a report containing proposed findings of fact and conclusions and recommending that the petition be dismissed. The petitioning defendant Lo Bue Brothers filed written exceptions to [207] this report and on December 3, 1956, the Judicial Officer of the Department of Agriculture issued his decision and order denying the relief requested, and dismissing the petition. The said Judicial Officer refused to make any finding on whether or not said petition was filed and prosecuted in good faith and not for purposes of delay, although requested so to do by Counsel for the Department of Agriculture.

XVII.

That on April 12, 1956, plaintiff filed an action No. 1637-ND in this Court against the defendant Lo Bue Brothers, a partnership, and the defendant partners, to enjoin violations of Order No. 14, under 7 U.S.C. Section 608a(5)(6) of the United States Code. A temporary restraining order against said defendants was issued and was followed on April 19, 1956, by a consent decree for permanent injunc-

tion enjoining them and all of their agents and persons acting for them from violating Order No. 14 and any lawful order, rule, or regulation issued by the Secretary of Agriculture thereunder.

XVIII.

That in filing the aforesaid petition with the Secretary of Agriculture, and in making the aforesaid twenty-six shipments of navel oranges in excess of its allotments on April 7, 1956, and April 8, 1956, defendant Lo Bue Brothers acted and relied upon advice given and information furnished by an attorney at law experienced in the law and the procedure particularly applicable to such matters.

Said attorney advised the defendants that a petition under Section 608c(15)(A) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 608c(15)(A)) was the proper and only procedure to obtain an official ruling upon the legality of the allotments imposed upon defendant Lo Bue Brothers under Order No. 14, that when such a petition was filed with the Secretary of Agriculture in good [208] faith the restrictions on shipments in excess of allotments would be suspended until there was a decision on the petition and during that period the petitioner, unless enjoined from further shipments, would be exempt from the penalties prescribed by the Act, and that in the only Court decisions which had been rendered on the subject, the immunity from penalties provided in such cases by Section 608c(14) of the Act (7 U.S.C. 608c(14)) had been construed to

extend to civil penalties as well as criminal penalties.

Said attorney also truthfully informed the defendants that his past experience had established the fact that petitions of this kind air mailed by him from Los Angeles, California to the Secretary of Agriculture at Washington, D. C. were received and filed the next day.

Late in the afternoon on April 6, 1956, said attorney telephoned the defendants at Lindsay, California and informed them that on the previous day he had air mailed the aforesaid petition of defendant Lo Bue Brothers to Washington, D. C., and that by that time said petition would be on file with the Secretary of Agriculture. Said attorney also informed the defendants at that time that if Lo Bue Brothers had navel oranges to ship in excess of its allotment it could begin the next day to make such shipments, and could continue to disregard its allotments unless and until it was restrained or enjoined from making further shipments.

XIX.

That the defendants accepted and believed the said advice and information given them by their said attorney, and defendant Lo Bue Brothers acted in good faith in reliance thereon in filing said petition with the Secretary of Agriculture and in making said twenty-six shipments of navel oranges in excess of its allotments on April 7, 1956 and April 8, 1956, and in so doing defendant Lo Bue Brothers exercised ordinary and reasonable care and caution to

avoid violating Order No. 14, and did not knowingly, intentionally, [209] or wilfully exceed its allotments thereunder.

As Conclusions of Law From the Foregoing Findings of Fact, the Court Concludes:

1. That defendant Lo Bue Brothers did not wilfully exceed any quota or allotment fixed for it under Order No. 14 by the Secretary of Agriculture, within the meaning of Section 608a(5) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 608a(5)).

2. That the plaintiff is entitled to take nothing from the defendants, or any of them, by reason of the complaint herein, and the defendants are entitled to judgment in their favor.

Now Therefore, by Reason of the Law and the Premises Aforesaid, It Is Ordered, Adjudged and Decreed that plaintiff take nothing from the defendants, or any of them, and that the complaint herein be and it is hereby dismissed.

Dated July 28, 1958.

/s/ GILBERT H. JERTBERG,
Judge, United States District
Court.

Approved as to Form:

LAUGHLIN E. WATERS,
United States Attorney;
RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division;

JORDAN A. DREIFUS,
Assistant U. S. Attorney,

By /s/ JORDAN A. DREIFUS,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

Lodged July 24, 1958.

[Endorsed]: Filed July 28, 1958.

Entered July 31, 1958. [210]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Plaintiff, United States of America, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on July 31, 1958.

Dated: This 18th day of September, 1958.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney;

JORDAN A. DREIFUS,
Assistant U. S. Attorney;

/s/ JORDAN A. DREIFUS,
Assistant U. S. Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed September 18, 1958. [211]

In the United States District Court, Southern
District of California, Northern Division

No. 1758—ND—Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LO BUE BROTHERS, a Partnership; MARIO
LO BUE, FRED LO BUE and JOSEPH LO
BUE, Partners; and WILLIAM LUTHER
WOODALL,

Defendants.

Honorable Gilbert H. Jertberg, Judge Presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

March 11 and 12, 1958

Appearances of Counsel:

For the Government:

LAUGHLIN E. WATERS,

United States Attorney, by

JORDAN A. DREIFUS,

Assistant United States Attorney, and

JOHN S. GRIFFIN,

Of Counsel for U. S. Department of
Agriculture.

For the Defendants:

G. V. WEIKERT, ESQ.

The Court: Will you call the case on for trial?

The Clerk: 1758, United States vs. Lo Bue Brothers, for trial.

The Court: The parties are ready?

Mr. Dreifus: Ready, your Honor.

Mr. Weikert: Ready, your Honor.

The Court: All right.

Mr. Dreifus: I would like to make a short statement on behalf of the plaintiff, and to bring up one matter which we feel must be disposed of before we begin the introduction of the evidence.

I think this can best be illustrated by stating briefly what the order of the plaintiff's proof will be. Under the plaintiff's view of the burden of proof we intend to do this, we shall offer in evidence as our first exhibit Paragraphs 1 through 12, inclusive, of the first Stipulation of Facts, which is on file in the court, filed about October 10th or 11th, 1957, I believe.

Now, under the plaintiff's view of the case, and under the plaintiff's theory of the burden of proof, as stated in the plaintiff's trial memorandum, those 12 paragraphs of that first stipulation state a prima facie case. They fully state the allegations of the complaint. [3*]

It is our view that the matters raised by the third affirmative defense of the answer filed by the defendants, and which are the subject of the remaining paragraphs of the stipulation of facts, and which could be the subject of oral testimony, are matters

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

of affirmative defense upon which the burden of proof in the legal sense is on the defendants.

In this connection, by stating that the burden of proof of the third defense of the answer is on the defense, I assume, as we stated in our trial memorandum, that as a part of the allegations thereof, namely, the particular allegation that a 15(A) petition was duly filed with the Secretary of Agriculture, that the word "duly" means that the defense was there alleging positively and in affirmative terms that that petition was filed in good faith and not for delay. Assuming that the plaintiff's view of the burden of proof is correct, and that paragraphs 1 through 12 of the first Stipulation of Facts, along with, I might mention, one oral stipulation that was entered into at the time of the hearing on the motion for summary judgment, which oral stipulation has been reduced to writing in the transcript thereof, that would state a prima facie case for the plaintiff, and it would then be incumbent upon the defendants at that point to go forward with the evidence, if any evidence is had, on the allegation that the 15(A) petition was filed in good faith, and the 15(A) petition was filed not for delay. [4]

We believe, therefore, that in the interest of the parties knowing the proper order of proof that the plaintiff be assured by ruling of the Court that the burden of proof on the two elements of the affirmative defense are indeed on the defendants, and that for this purpose the pleading in the answer of the third affirmative defense be made more specific,

definite and certain, where it alleges that a petition was duly filed, as to whether or not the defendants by that allegation intended to mean that the 15(A) petition was filed in good faith and not for the purpose of delay.

The plaintiff makes this statement because we are in the position of feeling that the defense has the burden of proof to raise this issue affirmatively. Nevertheless, we would not want to be foreclosed by a mere matter of the order of proof from getting in all available evidence on the question regardless of which party has the burden of proof.

I therefore move the Court at this time that the defendants be compelled to make a more specific and definite statement of whether or not the allegation, which specifically appears at line 17 on page 5 of the answer, means that a 15(A) petition there referred to was filed in good faith and not for delay.

(Short interruption for other court matter.)

Mr. Weikert: May it please the Court, I am afraid I do not quite understand the purpose of counsel's motion. There [5] has been no objection, demurrer, or other pleadings filed with respect to the answer, and I don't know whether he expects us to amend our answer at this time, or what. If that is the case, I think the motion is late. Where the burden of proof lies on any issue of the case is a question of law, regardless of what is stated in the answer, and it seems to me that orderly procedure would require the plaintiff to go forward with what-

ever proof he believes is necessary, and rest his case, and we will put in our evidence.

The Court: Of course, the over-all burden of proof, as I see it, rests upon the plaintiff. Now, I think that when we come to this special defense of whether or not the petition was filed in good faith and not for purpose of delay, I would say offhand that the burden of going forward with the evidence on that subject would rest with the defense. That would be my view of it at the present time.

Now, is that clear to you, Mr. Dreifus?

Mr. Dreifus: Yes; it is, your Honor. In view of that, the reason I asked for a more specific and definite statement in the answer was that if the defense introduced no evidence other than the remaining paragraphs of the stipulation, then it is our view that a renewal of the motion for summary judgment would be in order.

The Court: I think we better wait until you see what happens before anticipating a motion you might make. But as I [6] say, it is my view that the over-all burden, the burden is upon the plaintiff to prove by a preponderance of the evidence the essential allegations of the complaint. I think that the burden of proceeding with evidence on that special defense is upon the defendants, and, of course, if they offer no evidence on that subject, that is a problem we will have to face. Your motion, in effect to make their pleading, that third special defense I think it is, more certain, more definite, is probably not timely. The allegation that they duly filed a petition, of course, is really, I

suppose, an allegation of legal conclusion. The fact they have alleged it doesn't establish it. I think we better go forward and see how this thing works out.

Now, as I understand, you are going to introduce in evidence in this trial the first 12 paragraphs of the first stipulation.

Mr. Dreifus: At this time I offer in evidence the paragraphs 1 through 12, inclusive, of the first Stipulation of Facts. I request they be marked Exhibit 1 on behalf of the plaintiff.

The Court: That is the document filed in this court on October 11, 1957, designated Stipulation of Facts and Issues?

Mr. Dreifus: Correct, your Honor.

The Court: All right, the first 12 paragraphs of that document will be received in evidence and will be marked [7] Plaintiff's Exhibit 1.

(The stipulations referred to were marked as Plaintiff's Exhibit 1, and were received in evidence.)

Mr. Dreifus: I ask the Court further to take cognizance of and to receive in evidence the oral stipulations, which have been reduced to writing in a transcript of testimony, which occurred at the hearing on motion for summary judgment.

The Court: Is that document on file?

Mr. Weikert: I do not have a copy of it. I would like counsel to read it.

The Court: Is there a copy in the file? Just a minute, let's see if we can get it.

Mr. Dreifus: For the sake of clarity, your

Honor, the stipulations are short. May I read them into the record?

Page 17, line 23, reads:

“The Court: Well, Lo Bue was the handler; the sales were made or caused to be made by Lo Bue Brothers acting through Mr. Woodall, their sales manager, whether he made the sales directly or caused them to be made through himself or through Arena Brothers?”

“Mr. Weikert: Yes; I would stipulate to that in so many words.”

On page 19, line 3:

“The Court: Well, I assume that the packers, men physically engaged in packing, wouldn’t know or [8] care about the quota. I assume that the general manager would know what the quota was, and when it had been reached and when it had been exceeded.

“Mr. Weikert: I would stipulate further; I would stipulate with counsel that Woodall knew that these shipments were in excess of allotments, but he also knew that the petition had been filed, and he believed that they were exempted.”

That is all, your Honor.

The Court: Just those two. Very well, then, the matters read by counsel will be accepted as facts that have been stipulated by the parties.

Mr. Dreifus: Your Honor, the very last stipulation, I believe, was subject to the implied qualification at the time of Mr. Woodall’s knowledge that the petition had been filed actually meant his belief that it had been filed. Is that correct, counsel?

Mr. Weikert: I don't know. That is the stipulation. I don't think I can improve on it.

Mr. Dreifus: The stipulation as it was arrived at as to the context, your Honor, was of Mr. Woodall's state of mind as of the date and hour of the shipments. Therefore, I believe the word "knew" as used by Mr. Weikert probably was used by him in the sense that Mr. Woodall believed.

The Court: Isn't that the duty that the Court has to [9] perform, to interpret the language in the light of the circumstances surrounding it.

Mr. Dreifus: Thank you, your Honor. With that, your Honor, in view of our contention as to the burden of proof, the plaintiff rests.

Mr. Weikert: In view of the Court's ruling that the burden is now with the defendants to proceed, I will offer in evidence as the defendants' first exhibit paragraphs 13 through 16 of the Stipulation of Facts and Issues heretofore referred to by counsel as the first Stipulation of Facts.

Mr. Dreifus: For the sake of the record, your Honor, the plaintiff objects as immaterial.

The Court: 13, 14——

Mr. Weikert: 13 to 16, both inclusive; in other words, 13, 14, 15 and 16, and, of course, 16 includes the Appendix B attached.

The Court: It seems to me that much of the material contained in paragraphs 13 and 14 raise the question as to the validity of the order, the marketing order; I am not prepared to say for certain, in my brief review of it, but perhaps some reference to constitutionality. It seems to me that the

law is pretty well established, not only in this field but in other areas of the law involving administrative matters, that in the absence of an appeal from the order of the administrative agency this Court has no power, no authority [10] to go into the validity of the order.

Mr. Weikert: They are not offered for that purpose, your Honor. Those portions of the stipulation of facts are offered for the purpose of establishing that the petition was filed, and that the petition was filed upon those grounds. Before I can proceed to show good faith I believe I first have to show that there was good faith about something. In other words, I am showing by this offer that the petition was filed and that there were proceedings on it. Then I next intended to offer as the next exhibit the decision of the judicial officer on the petition. Then we will have before the Court the fact that a petition was filed and that action was taken on it. That is all. I am not asking the Court, in other words, to go into the merits of the petition.

The Court: In other words, these paragraphs of the stipulation that you have designated are offered in evidence solely on the issue of your third affirmative defense, that the petition was filed in good faith and not for purposes of delay?

Mr. Weikert: That is right, and they are merely descriptive of the nature of the petition.

The Court: Do you have anything to say?

Mr. Dreifus: We still believe, your Honor, that the matter is immaterial even for that purpose,

since it has nothing directly to do with the state of mind of the defendants, [11] because it is not essentially connected up with the final element.

The Court: Of course, for the first time in the record in this trial there has been offered a statement that a petition was filed. Now until there is evidence that a petition was filed, as suggested by counsel, there isn't much use going into the question as to the motives or the reasons behind the filing of that petition. Well, I am going——

Mr. Dreifus: May I add one more ground, your Honor?

The Court: Yes.

Mr. Dreifus: The other ground is that Section 608c(14) is inapplicable.

The Court: Yes; that is a legal problem that is involved here. I will admit the allegations contained in paragraphs 13, 14, 15 and 16 of the Stipulation of Facts, for the sole purpose of what bearing it has in relation to the third affirmative defense, what bearing it has with reference to the issue of good faith, and that the petition was not filed for purposes of delay. I am not receiving it to establish the truth of those allegations as a substantive thing. In other words, I feel that this Court is powerless to review the action of this administrative agency where the record shows that no appeal was taken. Do counsel understand clearly the ruling of the Courts as to the purpose for which this evidence is being received? [12]

Mr. Dreifus: That is, as I understand it, sub-

ject to the Court's determination as to whether 608c(14) applies?

The Court: Oh, yes; I think probably all these matters are subject to the determination as to the law as the Court finds it may apply to the facts.

Those paragraphs then for the limited purpose stated will be received and marked Defendants' Exhibit A.

(The stipulations referred to were marked as Defendants' Exhibit A, and were received in evidence.)

Mr. Weikert: Now, I offer as Defendants' Exhibit B a copy of the decision of the judicial officer on the so-called 15(A) petition referred to in Exhibit A, and I might state to counsel that this is one I removed from the document that was filed by counsel as an exhibit attached to the motion for summary judgment. Do you have another one?

Mr. Dreifus: I will stipulate to the authenticity of the document, your Honor. However, I have some objection.

The Court: You make your objection for the record.

Mr. Dreifus: It is objected to as immaterial on the same ground as the previous matter, the previous defendants' exhibit that we objected to; with the additional observation that, as the Court knows, as was more fully gone into on the motion to compel testimony, the decision of the hearing officer has no bearing on the issue of good faith or purpose of delay.

The Court: Well, I will overrule the objections, and I [13] will receive the document as Defendants' Exhibit B, for the limited purpose of what bearing the document has in relation to this third special defense set up in the defendants' answer. It will be limited to that purpose. That will be Defendants' Exhibit B in evidence.

(The document referred to was marked as Defendants' Exhibit B, and was received in evidence.)

Mr. Weikert: I call Mr. Mario Lo Bue.

MARIO LO BUE

one of the defendants, called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Mario Lo Bue.

The Clerk: Have that seat there.

The Court: If it is more convenient, Mr. Weikert, you may remain at counsel table. Ordinarily I find when counsel stand at the lectern they are inclined to keep their voices up and the witness tries to make the counsel hear. If you have a number of documents and it is more convenient, you may remain at counsel table.

Mr. Weikert: Whatever the Court would prefer; I do have a lot of documents.

The Court: As long as you keep your voice up, whatever enables you to work better it is satis-

(Testimony of Mario Lo Bue.)

factory to me. [14] Ordinarily counsel stand at the lectern.

Mr. Weikert: Thank you.

Direct Examination

By Mr. Weikert:

Q. Will you state your name, please, Mr. Lo Bue? A. Mario Lo Bue.

Q. Where do you live? A. Lindsay.

Q. And you are one of the defendants in this action, named as a partner in Lo Bue Brothers, a partnership? A. I am.

Q. Who are the partners?

A. Well, there is Fred Lo Bue, Joe Lo Bue and myself.

Q. They are your brothers? A. They are.

Q. Do you have some particular function in the partnership which is different from those of your brothers?

A. Well, I am the managing partner.

Q. And what do you do as managing partner?

A. Just what the name implies, manage.

Q. Well, be a little more specific.

A. Well, I look after the packing house in particular, and look after one of the groves.

Q. And as a part of your duties do you oversee the shipment of fruit? [15] A. Yes.

Q. And do you also oversee the matter of keeping the books and records of the partnership?

A. Yes; I do.

(Testimony of Mario Lo Bue.)

Q. Do either of your brothers have anything to do with the operations of the packing house, or the office? A. No; they do not.

Q. At any time, have they?

A. No, not (pause)——

Q. Now, going back to the spring, the early spring of the year 1956, will you please state in your own words the facts, circumstances which led up to the shipment of the fruit which is the subject matter of this action?

A. Well, the fact the fruit was deteriorating and dropping heavy on the ground is what made us seek this advice to see whether we could ship any of this fruit.

Q. Now, what did you do?

A. We sought advice from counsel, legal advice.

Q. Meaning myself? A. Yes.

Q. And what advice did you seek?

A. We sought to get protection on these oranges that was dropping. We felt there was some law that would protect the grower from losing all this fruit, and we came to see you with that. [16]

Q. Why was the fruit dropping and deteriorating? What was the circumstance?

A. Well, it had gone way beyond the historical life and the fruit was just dropping.

Q. You mean the regulation of shipments?

A. Yes.

Q. And you did consult me then?

A. Yes; we did.

Q. And what did I advise you?

(Testimony of Mario Lo Bue.)

A. You advised us that by filing a 15(A) that we could ship these oranges and be in our rights, the law gave us that right, so we went ahead on that idea there that you had given us.

Q. Did you come to Los Angeles and sign the 15(A) petition in my office? A. Yes; I did.

Q. And you swore to it there? A. Yes.

Q. And then were you advised at a later time that the petition had been filed? A. Yes.

Q. By whom? A. By yourself.

Q. And by what means of communication?

A. Telephone. [17]

Q. From Los Angeles to Lindsay?

A. Yes.

Q. And was it after that that you shipped the fruit here in question? A. Yes; we did.

Q. Did you rely on the advice that I gave you?

A. Oh, hundred per cent; I wouldn't have done it otherwise.

Q. Did you believe that when you were making these shipments you were violating any law or any order or any allotment? A. No.

Q. Would you have made these shipments if you had felt that you were violating any law, order or allotment? A. Not—before we had filed?

The Court: Read the question.

(Question read.)

A. No. Not if we had any kind of violation.

Q. What did you have in mind primarily in filing this petition?

(Testimony of Mario Lo Bue.)

A. We thought our legal rights was being violated by having this fruit go to waste.

Q. Did I advise you that the only way to proceed, in order to get a determination on those rights, was through the filing of a 15(A) petition?

A. Yes. [18]

Q. Did I say anything to you about an injunction? A. Yes; you did.

Q. What was that?

A. That we would probably be served an injunction in case we had to stop as soon as we got it.

Mr. Weikert: May I approach the witness with some documents, your Honor?

The Court: Yes.

Mr. Weikert: Mr. Lo Bue——

The Court: Has counsel seen the documents?

Mr. Weikert: Yes; it is part of the Stipulation of Facts.

Q. I show you Appendix A, which is a part of the Stipulation of Facts, called the first stipulation of facts, and which lists the 26 shipments made on Saturday—withdraw that—the 23 shipments made on Saturday, April 4, 1956, and the three shipments made on Sunday, April 8, 1956, and I will ask you——

The Court: Just a minute. Would you read that back, I didn't quite understand it, Miss Schulke?

(Question read.)

The Court: You have four days there between Saturday and Sunday.

(Testimony of Mario Lo Bue.)

Mr. Weikert: Did I say——

The Court: You might read it back to Mr. Weikert.

(Question reread.) [19]

Mr. Weikert: I am sorry, I meant April 7th, Saturday, April 7th, and Sunday, April 8th. Thank you for catching that, your Honor.

The Court: Well, in other words, there were 23 shipments made on April 7th, which was Saturday?

Mr. Weikert: That is right.

The Court: And there were how many shipments on Sunday?

Mr. Weikert: Three.

The Court: Three shipments on Sunday, April 8th. All right.

Q. (By Mr. Weikert): I will ask you, Mr. Lo Bue, to state whether you are familiar with all of those transactions? A. Yes; I am.

Q. And all of the records pertaining to them were made under your general supervision?

A. They were.

Q. Now, can you state when, referring to the hour approximately, the three shipments listed on Sunday, April 8th, were made?

A. Beginning about midnight, or thereabouts.

Q. Louder, the Judge can't hear you?

A. Around midnight, or thereabouts.

The Court: Midnight of Sunday night, or——

Q. (By Mr. Weikert): Sunday night, or [20] Saturday?

(Testimony of Mario Lo Bue.)

A. April 8th, is that Saturday?

Q. That is Sunday.

A. That would be Sunday night.

Mr. Dreifus: Excuse me. To make it clear, could the witness indicate whether it was prior to 11:59 or prior to——

Q. (By Mr. Weikert): Were they prior to midnight, Saturday, or after midnight, Saturday?

A. Probably more likely after midnight Saturday.

Q. After midnight, but, nevertheless, were they made Saturday night rather than in the daytime on Sunday?

Mr. Dreifus: Aren't we talking about Sunday here, the three?

Mr. Weikert: I asked whether they were made at nighttime rather than in the daytime on Sunday.

Mr. Dreifus: Well, now, are you referring to the early morning hours on Sunday?

Q. (By Mr. Weikert): The early morning hours, starting at 12:01 a.m.

A. They were tagged out on Saturday.

Q. Just answer my question. Were they shipped out in the early morning hours on Sunday, or in the daylight hours?

A. In the early morning hours.

Q. The Judge can't hear you.

A. Early morning hours, Sunday. [21]

Q. Now, can you state which, if any, of these shipments were actually sold at the time they were shipped?

(Testimony of Mario Lo Bue.)

Mr. Dreifus: Objected to as immaterial.

The Court: Well, I will overrule the objection.

A. Two I know of were sold on the same day.

Q. (By Mr. Weikert): Which ones were they?

A. Two to Safeway Stores.

Q. The two to Safeway, in other words, the first item 855 cartons, and the one, two, three, four—the tenth item at line 24, 1025 cartons? A. Right.

Q. Now, when were the others actually sold?

A. At a later date. They all went through our broker, A. Arena & Company, and he took care of the sales.

Q. At some date after the 8th?

A. Yes; several days after the 8th.

Q. Now, Mr. Lo Bue, it has been stipulated to, as a part of the plaintiff's case, in paragraph 12 of the first stipulation, that these 26 shipments totaled 26,349 cartons of navel oranges, and that Lo Bue Brothers ultimately received the gross sum of approximately \$49,870.74 for the sale of those oranges. Will you please state whether that sum of \$49,870.74 was retained by Lo Bue Brothers? [22]

Mr. Dreifus: Objected to as immaterial.

The Court: I will overrule the objection.

A. No; it was not.

Q. (By Mr. Weikert): How much of it was retained by Lo Bue Brothers?

The Court: The same objection?

Mr. Dreifus: The same objection, your Honor.

The Court: All right, it will be the same ruling.

(Testimony of Mario Lo Bue.)

A. Oh, in the neighborhood of 20,100 some dollars.

Q. (By Mr. Weikert): What became of the remainder?

A. Well, that was growers' money, it was given to them in their pool.

Q. In other words, this fruit in these 22 shipments belonged to whom?

A. Various growers.

Q. It was not Lo Bue Brothers' fruit that belonged to the packing house, is that right?

A. No; we had just a very small part, very small per cent was Lo Bue's fruit.

Q. Now, the difference then between this 20,100 some odd and the 49,870 was returned to the growers for their fruit?

A. That is right; it was their money.

Q. Now, did this sum of 20,150 odd dollars represent profit to Lo Bue Brothers on these shipments? [23]

A. No.

Q. Why not?

A. Well, we had all our expenses come out of that, such as packing, packing supplies, labor, and everything involved with packing oranges and also selling charges was paid to Arena for selling those.

Q. Can you state approximately the amount of net profit that was derived by Lo Bue Brothers on these 26 shipments?

A. I would say in the neighborhood of \$1,800, actual profit.

(Testimony of Mario Lo Bue.)

Q. Do you know anything about the manner in which mail is handled in the District of Columbia?

A. I don't even know in Lindsay.

Q. In other words, your answer is you don't?

A. I don't.

Mr. Weikert: You may cross-examine.

The Court: I think we will have our afternoon recess at this time.

(Short recess.)

Mr. Dreifus: First of all, the plaintiff moves to strike the testimony of the witness insofar as it relates to a price, or profit, as it related to shipments of oranges, rather than market value thereof.

The Court: I will deny the motion. [24]

Cross-Examination

By Mr. Dreifus:

Q. In your partnership which you have testified about on direct what are the partnership interests, by percentage?

Mr. Weikert: That is objected to as wholly immaterial.

The Court: I will overrule the objection.

A. A third, equal parts.

Q. (By Mr. Dreifus): Does Mr. Woodall, the manager, own any part of the partnership?

A. No.

Mr. Weikert: That assumes something not in evidence. Mr. Lo Bue is the manager.

The Court: Well, this is cross-examination, and

(Testimony of Mario Lo Bue.)

I think that where the witness has testified that certain parties are the partners that it is proper cross-examination.

Mr. Weikert: My point was, your Honor, that I thought counsel made a slip of the tongue. Mr. Woodall is the sales manager, and Mr. Lo Bue is the manager. He said Mr. Lo Bue, the manager, that is my only point.

Mr. Dreifus: I will qualify the question to Mr. Woodall, the sales manager.

The Court: Read the question as reframed.

(The question was read as follows: Does Mr. Woodall, the sales manager, own any part of the partnership?) [25]

A. No.

Q. (By Mr. Dreifus): Now, you stated on direct that you had fruit you desired to ship during March, 1956, and April, 1956, is that correct?

A. Yes.

Q. And you were unable to ship this fruit?

A. Right.

Q. Why?

A. Well, we had regulations and laws we had to go by.

Q. In other words, they limited the amount of fruit you could ship, is that right?

A. That is right.

Q. Navel oranges? A. Yes.

Q. Now, at the time you spoke to Mr. Weikert,

(Testimony of Mario Lo Bue.)

had you attended a meeting of what is known as the Navel Orange Administrative Committee?

A. That particular day?

Q. Within a week or two weeks before that particular day? A. No; I did not.

Q. Or after that particular day? A. No.

Q. On that particular day?

A. No; I had attended no meetings at all. [26]

Q. You have never attended any meetings of the Navel Orange Administrative Committee during March or April, 1956?

A. I attended just one meeting, it was way, way before this one.

Q. Do you know where the Navel Orange Administrative Committee meets?

A. You mean the address?

Q. What city? A. In Los Angeles.

Q. Do you know about where in Los Angeles?

A. I have forgotten the street address. It is on 7th Street, I believe.

Q. You were not there at a committee meeting during March or April, 1956?

A. I could have been there in March, I don't remember. I was there just once, I don't remember what the date was.

Q. Now, you stated on your direct examination that while the fruit was actually shipped on the 7th and 8th, the fruit which is the subject of paragraph 12 of our stipulation, that the sales of that fruit were made on other dates? A. Yes.

Q. And some of the sales were made after the

(Testimony of Mario Lo Bue.)

8th of April, weren't they? A. Yes.

Q. Is it not true that the purpose of shipping such [27] fruit in freight cars unsold and making the sales after the date on that particular week end was for the purpose of seeing to it that the freight cars were rolled, so to speak, not later than Sunday? A. I didn't understand the question.

Mr. Dreifus: Would you read the question back, please?

(Question read.)

The Court: I don't know that the question is entirely clear and free from ambiguity. Can you simplify the question?

The Witness: I can't understand it.

Mr. Dreifus: Yes. I will withdraw that question.

Q. Were you served on Monday or Tuesday, the 9th or 10th of April, with an injunction?

Mr. Weikert: Just a moment. We have in our stipulation of facts the exact date, and I don't believe the witness should be asked to call upon his memory.

Mr. Dreifus: I believe the date is the 10th.

Mr. Weikert: My recollection is it was the 12th.

The Court: My recollection is it was the 12th, but let's check it, we ought to be able to determine that accurately from our records.

Mr. Griffin: 15.

The Court: Do you have it, Mr. Griffin?

Mr. Griffin: Yes; it is stipulation 15, your

(Testimony of Mario Lo Bue.)

Honor, on April 12th the plaintiff filed an action to enjoin the [28] violation. I believe it was served on that same day, too, your Honor.

The Court: Well, if there is any question, we can certainly get the clerk to advise when the petition or complaint for an injunction was filed. Is there any question that it was April 12th?

Mr. Dreifus: I believe the stipulation is correct, your Honor.

The Court: All right.

Q. (By Mr. Dreifus): I will withdraw the previous question. You were served with an injunction on April 12, 1956? A. Yes.

Q. Now, did you realize that the government would file suit against you in the injunction case and get the injunction against you at the time you shipped the fruit?

A. We would be stopped from shipping?

Q. Yes.

A. Yes; we were told by counsel we would probably get the notice we would have to stop, which we did.

Q. Do you know whether your counsel took steps to dispute this injunction?

A. Not to my knowledge.

Q. Did you, through your counsel, later consent to the injunction being made permanent? [29]

Mr. Weikert: That is also covered by the stipulation of facts.

Mr. Dreifus: I am sorry, your Honor; I believe it is.

(Testimony of Mario Lo Bue.)

The Court: I thought so.

Q. (By Mr. Dreifus): Now, when you shipped the fruit over the week end of the 7th and 8th of April, when the shipments actually went out in freight cars, were you afraid over the week end of having an injunction against you? A. No.

Q. Why not?

A. Well, I figured it would come sooner or later but I didn't know it would be on a Saturday or Sunday. I wasn't there Sunday in the office at all.

Q. Did you know whether the government could have gotten an injunction even before you made the shipments on the Saturday and Sunday on which they were made?

Mr. Weikert: That is objected to as calling for a legal conclusion.

The Court: I think it is a conclusion, probably mixed fact and law, whether they could, whether they were legally entitled to, in other words, could they put the machinery in effect? I think I will sustain the objection to the question.

Mr. Dreifus: May I make a short statement, your Honor? One of the principal bases of this witness' justification for [30] this petition is it was on the advice of counsel. I regret to state that that being the principal ground it seems unavoidable sooner or later the actual advice and whatever ramifications there were to it is liable to come into issue.

The Court: Well, the witness has testified that he received advice from his counsel, and included in

(Testimony of Mario Lo Bue.)

that advice was the right of the government to enjoin shipments, that if an injunction was filed the shipments would have to stop. It is all part of what the witness has already testified to. Now, whether the government could it seems to me is a question not properly put to this witness.

Q. (By Mr. Dreifus): Mr. Lo Bue, at the time you made the shipments, or immediately prior thereto, you stated you relied on the advice of Mr. Weikert, your counsel? A. Yes; we did.

Q. Did Mr. Weikert tell you that you could expect the injunction even before the shipment?

A. No; he didn't. I don't think he ever mentioned the date we would get the injunction. He said some later date we would probably get an injunction. He didn't say what date.

Q. A later date after the shipments were made?

A. He said a later date. He didn't say after the shipments were made.

Q. Do you recall my asking you approximately the same [31] question on a deposition on February 27, 1958, in Mr. Weikert's office?

A. One very similar.

Q. Can you recall the answer you gave to the question at the time? A. Not offhand.

Mr. Dreifus: The deposition I mention, at page 8, lines 14 through 19.

Mr. Weikert: Thank you.

Q. (By Mr. Dreifus): Just read to yourself that question and answer, lines 14 to 19.

(Testimony of Mario Lo Bue.)

A. 14 to 19, yes. 21? No.

Q. Now, that answer to that question I just showed you, that was the truth when you gave it?

Mr. Weikert: That is objected to as not the proper way to impeach the witness.

The Court: That's right. If you have what you feel is an impeaching answer, you read the question to the witness, and read the answer, and ask him if that question was asked of him and if he gave that answer at the time of taking his deposition.

Mr. Dreifus: Was this question asked of you——

The Court: No; I don't know what the question is. You have got to read it, Mr. Dreifus. [32]

Mr. Dreifus: "Q. At the time you made the shipment, did Mr. Weikert tell you you could expect the injunction even before the shipment or after the shipment was made?

"A. Well, it would have to be after. You couldn't get it before, I don't suppose. I don't know how you could get one before. I don't know."

The Court: Ask the witness if that question was asked him and if he gave that answer.

Q. (By Mr. Dreifus): Was that question asked of you, and did you give that answer at the time?

A. I must have if it is on there.

Q. Now you stated you signed the 15(A) petition yourself, prior to the filing of it?

A. Yes; I did.

Q. Are you familiar with the allegations of the petition, the substance of it?

(Testimony of Mario Lo Bue.)

A. You mean what rights it gives us, gave us?

Q. Rather, are you familiar with what was stated in the petition as to why the pro rate allowments and marketing order you felt were illegal?

A. Well, I read the article, but I was not familiar with the words, they are legal words, and I am not a lawyer.

Q. Now, did Mr. Weikert explain to you that the purpose of filing a 15(A) petition was to see if you could declare the [33] prorated allotment and marketing order was void or illegal?

A. You mean by filing 15(A) it would be void?

Q. Yes.

A. I don't understand that question.

(Question read.)

A. I still don't quite understand, Mr. Dreifus.

Q. In your own words, would you repeat what you stated? I don't know whether you stated on direct the purpose which you had in mind in filing the 15(A) petition.

A. Well, because the fruit was going bad, that was the only reason. The fruit was just deteriorating, and we just sought legal advice.

Mr. Weikert: Will you speak up? Will you read that?

(Answer read.)

Q. (By Mr. Dreifus): Now, you stated you wanted to ship your oranges, I believe, that is the main reason you filed the petition?

(Testimony of Mario Lo Bue.)

A. Yes; because they were going bad. We wanted to ship them because they were no good on the ground.

Q. And are these particular oranges you referred to the ones you shipped in the 26 carloads?

A. All we had, I don't remember.

Q. Including these 26 carloads you shipped over the 7th and 8th of April? A. Yes. [34]

Q. And then after you shipped these carloads of oranges, and assuming that this was a legal shipment of carloads of oranges, did you then feel that your legal rights had been completely vindicated?

The Court: Well, I don't see that is going to be of assistance to the Court.

Mr. Dreifus: I am trying to get at his own state of mind, your Honor. Perhaps I can rephrase the question. I will withdraw that question.

Q. At the time you filed this 15(A) petition, you felt that the government was violating your rights with respect to just these particular oranges that you shipped around the 7th and 8th of April, 1956?

A. It was all oranges, not just particularly ours.

Q. Well, just limiting it to your oranges.

A. Not my own, no. You mean our own personal oranges?

Q. I mean those you shipped.

A. No; the whole district.

Q. Well, did you feel that you were filing a petition on behalf of the whole prorated district?

A. No.

(Testimony of Mario Lo Bue.)

Mr. Weikert: That is objected to as argumentative.

The Court: I think it is.

Mr. Dreifus: I withdraw the question.

Q. Now, Mr. Weikert, you state, I believe, informed you [35] by telephone that the petition had been filed? A. Yes.

Q. Now, you signed the petition on Thursday, April 5th, is that correct?

A. I don't know what date it was.

The Court: It is stated in the stipulation.

Mr. Dreifus: It is already in evidence that you signed the petition on April 5th.

A. It could have been. I don't recall the date. It was a weekday, is all I can remember.

Q. Which would be a Thursday?

A. I don't recall; it could have been Monday.

Q. Well, now, assuming that Mr. Weikert called you at some time after your signing the petition and some time prior to the actual shipment of the oranges, which took place on the following Saturday and Sunday, did Mr. Weikert call you on that Friday in between?

A. Before we shipped? The day before we shipped?

Q. Yes.

A. He called us before we could start shipping. He called and said it was filed and we could go ahead and ship, and there would be no violation.

The Court: The stipulation, paragraph 13, states on April 5, 1956, the document, the petition was

(Testimony of Mario Lo Bue.)

mailed. I don't know whether the stipulation covers when the witness signed it, [36] whether he signed it on the day it was mailed or not.

Q. (By Mr. Dreifus): Now, did Mr. Lo Bue, your sales manager, to your knowledge, consult with Mr. Weikert?

The Court: You are talking about the sales manager?

Mr. Dreifus: Yes.

The Court: What is his name?

Mr. Dreifus: Mr. Woodall. Excuse me, please.

Q. Did Mr. Woodall, your sales manager, to your knowledge, consult with Mr. Weikert prior to your signing the petition?

A. Could have; he was down in Los Angeles at the broker's office.

Q. Well, either you or Mr. Woodall had consulted with Mr. Weikert concerning the preparation of such a petition prior to the day you signed it, is that correct? A. Yes.

Q. Can you recall how long before the day you signed the petition it was that you consulted with Mr. Weikert, and engaged him to prepare such a petition?

A. No; I don't recall how long it was now.

Q. But it was prior to that day? A. Yes.

Q. Now, there was some urgency connected with the shipment of the oranges, was there not?

A. Yes. [37]

Q. They were, as you say, dropping on the ground and spoiling?

(Testimony of Mario Lo Bue.)

A. Yes; getting puffier, and everything wrong.

The Court: You will have to speak louder. It is difficult for me to hear and I am sure Mr. Weikert can't hear you. Would you read the last answer?

(Answer read.)

Q. (By Mr. Dreifus): Why, if that was the case, did you wait any length of time at all between the time you first consulted with Mr. Weikert and the time you came down to sign the petition and caused its filing?

A. Well, we was watching the different pools as we went along, they kept getting worse and worse, and just something had to be done, it just got so bad.

Q. But you state that you consulted with Mr. Weikert at some time prior to the day on which you signed the petition? A. Yes; we did.

Q. Why, if it was against your interest to delay in any amount whatsoever, did you delay from the time you first consulted with Mr. Weikert, from that time until the day on which the petition was filed?

Mr. Weikert: That is objected to——

The Court: Let me say this, Mr. Dreifus: I realize this is cross-examination. The witness testified he consulted, he [38] or Mr. Woodall consulted Mr. Weikert prior to the date on which the petition was signed. Now, I don't know whether there was any delay between the first consultation and the signing of the petition. After all, I know from

(Testimony of Mario Lo Bue.)

my own experience that lawyers just can't go to a shelf and pick out a petition and mail it. There has to be some time for a lawyer to analyze the matter and to prepare the required documents. Now, I think before we talk about delay we should, if we can find out from the witness the time that elapsed between. It is one thing if you consult a lawyer six months before coming back, and another if you consult a lawyer a day or two before a petition is filed. You have got to allow even a lawyer some time to do his work.

Q. (By Mr. Dreifus): Calling your attention to Mr. Woodall, your sales manager, you stated that Mr. Woodall could have consulted with Mr. Weikert at some time prior to the date on which you signed the petition? A. Yes.

Q. If he did so, it was in behalf of Lo Bue Brothers, was it not? A. Yes.

Q. Do you know whether Mr. Woodall consulted with Mr. Weikert on the same day as a Navel Orange Administrative Committee meeting was held which took place on March 29, 1956? [39]

A. I don't know if he did the same day or not.

Q. If it was not the same day, was it a day shortly before or after that day?

A. I can't remember that. I really don't know whether it was before or after.

Q. Now, you were present when Mr. Woodall's deposition was taken on January 28, 1958, and on February 27, 1958? A. I was; yes.

(Testimony of Mario Lo Bue.)

Q. Did you hear Mr. Woodall testify that he consulted with Mr. Weikert on a day prior to the day on which you signed the petition?

A. I don't remember what day it was. I don't remember him saying what day.

Mr. Dreifus: One moment, your Honor. No further questions of this witness.

Mr. Weikert: No further questions.

The Court: I would like to ask the witness a few questions. According to your testimony there were 23 carloads shipped on April 7th, which was Saturday, is that right?

The Witness: Yes.

The Court: Now, do you know when they were shipped, during the daytime on Saturday, or at night, or when?

The Witness: Well, the rail pickup is around midnight.

The Court: So that would be, say, after midnight on Saturday? That would be early [40] Sunday?

The Witness: It is after 12:59.

The Court: All right, then there were three carloads that would be shipped after midnight on the next night?

The Witness: Right.

The Court: Is that right?

The Witness: Yes.

The Court: Now, you are also an orange grower?

The Witness: Yes.

(Testimony of Mario Lo Bue.)

The Court: And you have a grove, or the partnership has?

The Witness: Yes; we have.

The Court: And were any of your oranges included in these shipments?

The Witness: Yes; they were.

Mr. Dreifus: Pardon me, your Honor, there is one thing not clear. The 23 carloads, I believe, the witness referred to, were shipped, if I understood the witness correctly, after 12:01 a.m., Saturday.

Mr. Weikert: No. Oh, Saturday. Yes.

The Court: Yes; that is what I say; that is really Sunday morning, isn't it?

Mr. Dreifus: No; that would be Saturday morning; it would be Friday night.

The Court: I would like to get that clear. Saturday was the 7th; Friday was the 6th. Now, were these 23 carloads shipped, we will say, early Saturday morning, after midnight [41] of Friday night?

The Witness: After midnight, yes.

The Court: Of Friday night?

The Witness: That was the 6th. I don't recall whether that was Saturday.

The Court: I think everybody——

The Witness: If it is Saturday.

The Court: ——has recognized in this hearing that Saturday was the 7th, Sunday was the 8th.

Mr. Dreifus: Correct, your Honor.

The Witness: Yes.

The Court: So it is your best belief now that

(Testimony of Mario Lo Bue.)

the 23 carloads went out after 12:00 o'clock midnight of Friday——

The Witness: Yes.

The Court: ——which would be on the 7th?

The Witness: Yes.

The Court: Early Saturday morning?

The Witness: Yes.

The Court: And that the other three carloads went out after midnight on——

The Witness: The following day.

The Court: ——the 8th——

The Witness: Following day.

The Court: ——which was early Sunday morning?

The Witness: Right. [42]

The Court: Now, coming back to your oranges, with respect to oranges belonging to other growers, are you a broker or a commission merchant? What is the basis upon which you ship oranges belonging to other growers?

The Witness: On a consignment basis.

The Court: On a consignment basis. And for your services—well, first, you have a packing house?

The Witness: We do.

The Court: And you receive the oranges of these growers——

The Witness: Yes.

The Court: ——and I don't know exactly what you do, but among other things I suppose you have them wrapped in paper, do you?

(Testimony of Mario Lo Bue.)

The Witness: We used to; we now put them in cartons.

The Court: Put them in these cardboard cartons?

The Witness: We pack and sell them for the account of growers.

The Court: And I suppose they are different sizes?

The Witness: Yes.

The Court: And they are shipped in different cartons?

The Witness: Various sizes and various grades.

The Court: All right. Then they are consigned, and after the oranges have been sold—I am talking about oranges belonging to other growers—after they have been sold, the proceeds of sale come to you—— [43]

The Witness: Yes.

The Court: ——and out of that you deduct any railroad charges, any packing costs——

The Witness: Yes.

The Court: ——things of that sort, and then you deduct a commission, selling charge?

The Witness: Packing and selling is deducted.

The Court: Packing and selling are deducted?

The Witness: And the balance is returned to the growers.

The Court: The balance is returned to the growers, and with respect to your own oranges, why, you, of course, have the same expenses in connection with your packing and selling?

(Testimony of Mario Lo Bue.)

The Witness: Yes; we put ourselves in just like the other growers.

The Court: Yes. Do you know out of the entire shipment what percentage was your oranges, as distinguished from the percentage belonging to the other growers?

The Witness: Of the 26 cars?

The Court: Yes.

The Witness: We have what we call a two-week pool, and these oranges were about double the amount in the pool as what is represented by these 26 cars. It is hard to distinguish.

The Court: It is hard to tell if these were in this pool——

The Witness: This fruit was in those pools. We had about double the amount in the pool. Once they are packed [44] they lose identity, we don't know whose they are.

The Court: Well, out of the entire pool then, what percentage would be yours?

The Witness: I would say about five or six per cent of the whole pool, which was double the amount of these cars in question.

The Court: Now, the 23 cars were disposed of to Safeway Stores?

The Witness: No; not all of them. Just two, I believe.

The Court: Two cars?

The Witness: Yes. The rest was through our broker, just consigned to him and they went to various concerns.

(Testimony of Mario Lo Bue.)

The Court: Was the sale to Safeway a direct sale made by you?

The Witness: Yes.

The Court: I see. The rest of it was Arena; is he a handler or receiver, broker?

The Witness: Broker. He sells to the eastern market and collects for them and pays us.

The Court: All right. I have no further questions.

Redirect Examination

By Mr. Weikert:

Q. Mr. Lo Bue, about how many growers were in this pool that covered among other shipments these 26?

A. Oh, 15 or 18, in that neighborhood. [45]

Q. Can you name any of them?

A. Oh, yes; Mr. Boswell, Mr. Wittmore, Mr. Carter, Dr. McClaskey, Mr. Sherry, Mr. Young, quite a few of them.

Q. Were all of these 26 shipments made in railroad cars, or were some of them made in trucks?

A. I believe there was one made in truck; the rest was all cars.

Mr. Weikert: That is all.

Mr. Dreifus: Excuse me, your Honor.

The Court: Just a minute.

Mr. Dreifus: It was our impression that the 26 shipments were 26 railroad cars, as stipulated to in paragraph 12. May I consult with counsel a moment?

(Testimony of Mario Lo Bue.)

Mr. Weikert: I don't see anything about railroad cars; it just says "shipment."

The Court: Paragraph 12 says 26,349 cartons handled in excess of their allotment were ultimately sold to various customers.

Mr. Weikert: Well, the very first shipment, 855 cartons, that is not a carload. There are 1025 in a carload.

The Court: Oh, yes; that appears in, what, paragraph 10?

Mr. Weikert: It is in the Appendix A, attached to the stipulation of facts, first item of Safeway Stores, 855 cartons. Then on the next page, on the 8th, the first item is 883 cartons, which would seem to indicate it is not a carload. [46]

The Witness: That could be a truck, too.

Mr. Dreifus: Your Honor, we have evidence in a deposition, which I believe could settle this matter.

The Court: Is it material?

Mr. Dreifus: I don't believe it is material, your Honor. It would take up the time of the Court at this time to figure which were the truck shipments. The evidence is available.

The Court: What difference would it make as far as enabling me to make a decision on this case?

Mr. Dreifus: Actually I don't believe it would, your Honor, except possibly on a question of intent it could become material, although I do not see yet how it could be material.

The Court: All right. I guess that is all then.

The Witness: Thank you.

Mr. Dreifus: I have no further questions.

(Witness excused.)

Mr. Weikert: I call Mr. Woodall. [47]

* * *

WILLIAM LUTHER WOODALL

called as a witness for defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: William Luther Woodall.

The Clerk: Have that seat. [48]

Direct Examination

By Mr. Weikert:

Q. Where do you live, Mr. Woodall?

A. Lindsay.

Q. And are you connected with Lo Bue Brothers?

A. Yes, sir.

Q. What is your connection?

A. Sales manager.

Q. And how long have you been sales manager?

A. Some four years.

Q. In other words, you were sales——

A. More or less.

Q. ——manager at the time the shipments here in question were made? A. Yes.

Q. And you knew that these shipments were being made, did you not? A. Yes, sir.

Q. And did you know of the filing of the 15(A) petition? A. Yes, sir.

(Testimony of William Luther Woodall.)

Q. Did you know of the advice given to Mr. Lo Bue, to which he has testified? A. Yes, sir.

Q. By me? A. Yes, sir. [49]

Q. And did you also know that before any of these shipments were made Mr. Lo Bue had been notified by me that the 15(A) petition was filed?

Mr. Dreifus: I object to the question, your Honor, as leading.

The Court: They are leading. I will sustain the objection to the last question. I think it is leading; it may have been out of desire of counsel to save time. I will sustain the objection.

Mr. Weikert: I am trying to get through.

The Court: Yes. I will sustain the objection.

Q. (By Mr. Weikert): Did you talk to me on the extension telephone in Lindsay at the same time that I talked to Mr. Lo Bue, and told him that the 15(A) petition had been filed? A. Yes.

Mr. Dreifus: Your Honor, again, he is leading the witness. I agree he has to get the time and place, but he is putting too much in.

The Court: Well, the witness has answered the question. You may cross-examine him. The question has been answered; the answer may stand.

Mr. Weikert: You may cross-examine.

Mr. Dreifus: Your Honor, in view of the hour I can see it might take at least 20 or 25 minutes to cross-examine Mr. [50] Woodall. May I reserve my cross-examination?

The Court: In order to put on the other witness?

Mr. Dreifus: Yes.

(Testimony of William Luther Woodall.)

The Court: All right.

Mr. Weikert: There is certainly nothing to rebut.

The Court: I don't know; I never know until the questions are asked.

Mr. Weikert: At this point, if counsel is going to put on a witness to testify in rebuttal of something Mr. Woodall hasn't testified to, there is no foundation laid for it.

Mr. Dreifus: May I do this, your Honor? I believe counsel is correct. I would like to cover one particular subject with Mr. Woodall, rather than get into a long situation with him. After covering that, I would like to reserve the rest of my cross-examination.

The Court: Confine yourself initially then particularly to the matter upon which you wish to cross-examine the witness. Then when you have concluded that, I will permit you to put on your witness, and then resume the cross-examination of Mr. Woodall.

Cross-Examination

By Mr. Dreifus:

Q. Mr. Woodall, do you know what the Naval Orange Administrative Committee is?

A. Yes, sir. [51]

Q. Calling your attention to March, 1956, were you at that time the sales manager of Lo Bue?

A. Yes, sir.

Q. Representing Lo Bue, did you attend two

(Testimony of William Luther Woodall.)

meetings of the Navel Orange Administrative Committee in Los Angeles during March, 1956, particularly on March 15th and March——

A. Not representing Lo Bue, no.

Q. ——29, 1956?

The Court: I gather you were present at the meetings?

The Witness: Yes, sir.

The Court: Two meetings, but weren't there representing Lo Bue Brothers, is that it?

The Witness: That is right.

Q. (By Mr. Dreifus): If you weren't there representing Lo Bue Brothers, what was your business at these meetings?

A. I was there in the interest of my own acreage of citrus, that I own and control as a grower.

Q. Did you make any representations to this Committee on those two occasions that you were thus representing only your own acreage by your attendance at the Committee meeting?

A. I don't remember the words I said. However, I could only speak for myself, because I wasn't instructed by Lo Bue Brothers to make any statements.

Q. Prior to that time had you ever attended any [52] Committee meetings of the Navel Orange Administrative Committee? A. Yes.

Q. Had you attended committee meetings of committees involved with other commodities besides navel oranges, such as Valencia oranges and other types of fruit?

(Testimony of William Luther Woodall.)

Mr. Weikert: I object as immaterial, involving different committees and different orders.

Mr. Dreifus: May I modify the question slightly?

Q. Regarding fruit of the type handled by Lo Bue Brothers and shipped by Lo Bue Brothers?

Mr. Weikert: The same objection, your Honor, unless it is related to the Navel Orange Committee and the navel regulations I don't see that it has any bearing. Lo Bue Brothers might be shipping peaches.

The Court: Well, I am going to overrule the objection. Now, read the question so you understand it.

(Question read.)

A. I have attended various meetings in my lifetime.

Q. (By Mr. Dreifus): Now, have you ever attended any Navel Orange Administrative Committee meeting during all the time that you have been sales manager for Lo Bue Brothers, other than these two occasions, when you did not represent Lo Bue Brothers at such meeting? [53]

A. I never had any authority to represent Lo Bue Brothers at any prorate meetings.

Q. Did Lo Bue Brothers ever since you have known them or been connected with them send anybody to a prorate meeting of the Navel Orange Administrative Committee?

A. Well, I don't know what you mean by that.

(Testimony of William Luther Woodall.)

We pay a fee for a representative, a district representative.

Q. By represent, I mean have you or anyone else on behalf of Lo Bue Brothers attended any committee meeting in order to make any comments, make any statements, or just to see what was going on in the committee meeting?

The Court: Now, you are talking about this particular Navel Orange Committee?

Mr. Dreifus: Yes, your Honor.

The Court: What is the exact name of it?

Mr. Dreifus: Navel Orange Administrative Committee.

The Court: Will you read the question, and, Mr. Woodall, keep your voice up so we can all hear you.

(Question read.)

The Court: Why don't you first ask the witness if he has ever attended a meeting of this Navel Orange Advisory Committee, other than these two?

Q. (By Mr. Dreifus): Have you ever attended a Navel Orange Administrative Committee meeting, other than those two? [54]

A. Yes, many of them.

Q. And at those other meetings, did you represent solely yourself, your own acreage?

A. Yes, sir.

Q. At those other times, did you so advise the Committee, that you were representing only yourself and your own acreage?

A. I might have said my groves, but I never

(Testimony of William Luther Woodall.)

had no authority from Lo Bue Brothers to represent them and make any statement whatsoever in a committee meeting of Lo Bue Brothers, never did I have any advice or authority what to say or what to do at any meeting.

Q. Now, when you say your growers and your own acreages, does that include any acreage or growers who provided the oranges, the 26 loads of which were shipped on the 7th and 8th of April?

A. I had no right to make that statement, or I didn't mean them. I was only talking about myself, because all growers shipped their fruit through Lo Bue.

Mr. Dreifus: Would you please read the question back to the witness?

(Question read.)

A. It would include my own, my brothers', my sons' and my partnership.

Q. You didn't answer my question. Will you read it again? [55]

(Question reread.)

A. I said my own, my sons', and my partnership.

Q. What you just said, your own, your sons' and your partnership, were any part of those oranges in those that were shipped on the 7th and 8th of April? A. Some, yes.

Q. Now, coming back to the two meetings, let's take the first meeting first, the one on March 15th,

(Testimony of William Luther Woodall.)

1956, can you recall your participation in any discussion that was had at that meeting?

A. I don't remember what dates.

Q. I didn't hear your answer.

A. I don't remember what dates, whether it was March 15th, or April 15th, or when it was.

Q. You recall going to two meetings?

A. I recall going to two meetings.

Q. In March. During either of those two meetings did you participate in any discussion in the presence of the Navel Orange Administrative Committee? A. Yes.

Q. Can you recall what, if anything, you said in any such discussion?

A. I said I thought we was being dealt a very raw deal, our fruit being prorated ten weeks past the historical life of it, when Southern California was only going two weeks past [56] the historical life of their fruit, and I was going to see if there was a way that I could move my fruit, if there was any way possible I was going to ship my fruit.

Q. Is that all you said?

A. I can't remember two years back the exact words, but I know that was the meaning of the conversation.

Q. Did you have any other conversations with any member of the Navel Orange Administrative Committee, shortly before or after either one of these two meetings, any private conversation?

A. I don't remember.

Q. Did you have any private conversation with

(Testimony of William Luther Woodall.)

the manager of the Committee, shortly before or after either one of these two meetings?

A. I don't remember.

Q. Do you know who the manager of the Committee was then?

A. I guess Mr. Coogan was.

Q. Do you see Mr. Coogan here? A. Yes.

Q. Point him out.

A. Man on the left over there.

Q. You can't remember having a discussion with Mr. Coogan? A. Personally? [57]

Q. Yes, personal discussion between you and Mr. Coogan shortly before or after one of these two meetings?

A. I don't know, personally. Any discussion there was always a bunch of people around.

The Court: The question is whether you had a private meeting, at which I assume there were only you and Mr. Coogan present.

The Witness: No, no.

The Court: Is that what you meant, Mr. Dreifus?

Mr. Dreifus: I meant by private meeting, any meeting other than while the committee itself was in session, just before they went into the session, or just after the session broke up.

The Court: Oh, you mean informal, as distinguished from discussions that were formal at the meeting?

Mr. Dreifus: That is correct, your Honor.

The Court: All right.

(Testimony of William Luther Woodall.)

A. I had no private—anything that was discussed, people was standing around. We never was in a room to ourselves discussing a private conversation.

Q. (By Mr. Dreifus): Did you have a discussion with Mr. Coogan while someone else, one or more persons were standing around?

A. I don't remember. I probably did.

Q. You can't recall what it was? [58]

A. No, I can't.

Mr. Dreifus: That is all the cross-examination I have at this time, your Honor.

The Court: All right, you may step down.

(Witness temporarily excused.)

* * *

M. D. STREET

called as a witness by the government in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: M. D. Street.

The Clerk: Have that seat there. [59]

Direct Examination

By Mr. Dreifus:

Q. Mr. Street, what is your residence?

A. Los Angeles.

Q. And what is your occupation?

(Testimony of M. D. Street.)

A. I am treasurer of Sunkist Growers and a member of the Navel Orange Administrative Committee.

Q. Were you during March and April, 1956, a member of the Navel Orange Administrative Committee? A. I was.

Q. Were you present at the meeting held by the Navel Orange Administrative Committee on Thursday, March 15, and Thursday, March 29, 1956, in Los Angeles? A. Yes, I was.

Q. You heard Mr. William L. Woodall, the last witness, testify here in court today? A. Yes.

Q. Was he present at those two meetings?

A. Yes, he was.

Q. Calling your attention, sir, to the first of the two meetings, do you have a recollection as to any discussion which occurred at such meeting, in which Mr. Woodall participated? A. Yes, I do.

Q. In what capacity did Mr. Woodall attend these two meetings? [60]

Mr. Weikert: Objected to as calling for the conclusion of the witness.

The Court: I think so. I will sustain the objection. You can state what Mr. Woodall said, but I don't think you can ask this witness in what capacity, it calls for his opinion and conclusion. I will sustain the objection.

Mr. Dreifus: That was error, your Honor. What I would like the witness to state for us, was Mr. Woodall a member of the Committee, or was he a

(Testimony of M. D. Street.)

person of another status other than member of the Committee.

The Witness: Mr. Woodall was an observer. He certainly was not a member of the Committee.

Q. (By Mr. Dreifus): In other words, was it a practice that persons other than specifically members of the Committee could attend committee meetings?

A. Yes, it is an open meeting and as a general rule there are several observers.

The Court: In other words, your meetings are public meetings, and anybody that really had any reason to be there would be admitted?

The Witness: They are public meetings and all growers or anyone interested may attend.

The Court: You don't question the right of any person to come in there at all? [61]

The Witness: Anyone may attend, and may take part in the discussion, if they so wish.

The Court: All right.

Q. (By Mr. Dreifus): Now, coming directly to any discussions or transactions in which Mr. Woodall participated at the first meeting, can you recall anything at that meeting that was said by Mr. Woodall to the Committee?

A. Well, naturally I can't remember the exact words, but Mr. Woodall was—made it quite clear to the Committee that he disapproved of what the Committee was doing, the way in which they set the allotments, that as a result of the small, relatively small allotment set for Central California,

(Testimony of M. D. Street.)

the district Mr. Woodall was in, that great hardship was being caused on the operators, people in that district. I think he was speaking principally for himself. I don't know whether he was speaking for himself or Lo Bue Brothers, he didn't say, but he was extremely critical, I remember that very clearly, of the actions of the Committee, and he made it quite clear to the Committee, as he put it, he was getting a raw deal and he intended to move his fruit, to ship his fruit in one way or another, and he would find some way to do it.

Q. Now, by the words "his fruit" did you understand Mr. Woodall to mean fruit that was ready to be shipped as of those few weeks of that month, or did you understand that to [62] mean it could be fruit in the next year, 1957 and 1958?

Mr. Weikert: Objected to as calling for a conclusion.

The Court: Yes, I will sustain the objection. I think it is up to this Court to decide from the testimony what he meant. I will sustain the objection. I don't want to limit you, whatever the witness recollects as to what Mr. Woodall said will come in. Now, as to what he meant by it, or the effect of it, I think it is my responsibility as a Judge to determine that.

Q. (By Mr. Dreifus): Was there any further discussion between the Committee and Mr. Woodall on the first meeting, other than what you have already told us?

A. I don't believe there was any discussion on

(Testimony of M. D. Street.)

the part of the Committee at all. It was all observation from Mr. Woodall and perhaps other observers had observations.

Q. Now, on the second meeting on March 29th, 1956, Mr. Woodall was present at the second meeting?

A. Yes, he was.

Q. And was he also an observer at this second meeting, the same as the first?

A. Yes.

Q. At that second meeting, did Mr. Woodall participate in any discussion with the Committee?

A. I don't believe he participated in any discussion. [63] He had observations to make along the same line as I have already said. I don't recall it was very much different.

The Court: In other words, the Committee let these observers talk?

The Witness: Yes.

The Court: I see.

The Witness: It wasn't a question of any discussion back and forth. The chairman of the Committee, as a general practice, asks anyone in the room, goes around and asks each observer if they have any comments to make, so this is a full and free and open meeting where anybody can say anything they want, give their views and so forth, and that was the nature of the observations Mr. Woodall made, and I can't distinguish between the 15th and the 29th as to what was said, but things were getting tougher on the 29th and fruit was dropping on the ground and deterioration was taking place, and the Committee had great sympathy

(Testimony of M. D. Street.)

with everyone, but Mr. Woodall simply made his observations.

Q. (By Mr. Dreifus): Did you notice anything unusual or exceptional about Mr. Woodall's manner on the meeting on the day of the 29th?

Mr. Weikert: Objected to as calling for the conclusion of the witness. It's too bad we didn't have a motion picture.

The Court: Well, the witness can tell what he did, and [64] what he said, and any outward activity on the part of Mr. Woodall. I assume that Mr. Woodall was quite positive in his views.

The Witness: Your Honor, I could certainly say that. There was no uncertainty in the way he expressed himself about the situation and how he felt about what the Committee was doing, and he didn't like it.

The Court: Well, I don't know what counsel wants exactly, but did he talk in a very loud and excited voice? I don't know what you mean by manner.

Mr. Dreifus: That is what I was getting at, your Honor.

The Witness: I don't recollect whether he talked in a loud or excited voice, but he was certainly disturbed, made it very clear that he didn't like the way things were being done, and perhaps at times he did show some excitement.

Q. (By Mr. Dreifus): Other than the occasion on which Mr. Woodall made his observation during these two meetings, have you heard anything from

(Testimony of M. D. Street.)

him, or been in his presence while he has discussed this matter on any other occasion?

A. No, to my knowledge I haven't been with him, I haven't heard Mr. Woodall discuss it outside of the committee meetings where he made these observations. It was public information to the whole committee.

Mr. Dreifus: That is all, your Honor. [65]

Mr. Weikert: No questions.

The Court: That is all, Mr. Street.

(Witness excused.)

Mr. Dreifus: Mr. Dungan.

JACK M. DUNGAN

called as a witness by plaintiff in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Jack M. Dungan.

The Clerk: Have that seat.

Direct Examination

By Mr. Dreifus:

Q. Would you state your residence?

A. Exeter, California.

Q. What is your occupation?

The Court: May I find out, I didn't get the pronunciation or spelling of your name?

The Witness: Dungan, D-u-n-g-a-n.

The Court: Thank you.

(Testimony of Jack M. Dungan.)

Q. (By Mr. Dreifus): What is your occupation?

A. I am a rancher, orange grower and grape grower, and member of the Navel Orange Administrative Committee.

Q. During March and April, 1956, were you a member of that Committee? [66]

A. I was.

Q. Did you attend the two meetings on March 15th and March 29th, 1956, that were held in Los Angeles, and about which Mr. Street has just finished testifying? A. I did attend, yes.

Q. And did you hear Mr. Street's testimony on the stand? A. Yes.

Q. Were you present during committee meetings on the same occasions and at the same times Mr. Street testified to? A. Yes.

Q. And did you hear Mr. Woodall make his observation and participate in the discussion on the same occasions? A. I did.

Q. Is your recollection of what transpired and what was said between Mr. Woodall and the Committee the same as what Mr. Street has just testified to? A. I think so, yes. Yes, it was.

Q. Do you have anything that you can recollect that is different from, or that you can add to what Mr. Street has already testified to?

A. One point is that when we sit as a committee and these observers come in we—handler members like Mr. Woodall is, I think in all cases the Com-

(Testimony of Jack M. Dungan.)

mittee presumes they are representing the organization, rather than themselves. [67]

Mr. Weikert: Now, just a moment. I move to strike that answer as containing quite a number of conclusions, namely, he said Mr. Woodall was a handler member. There is no evidence he is a handler or a member of anything, and what the Committee assumes is certainly not binding.

The Court: Well, I think I will strike the answer of the witness as not responsive. Let's read the question. Now, what we are interested in, Mr. Dungan, is what Mr. Woodall said and what he did, and if you want to describe his actions or manner, you may do so, on those two meetings. Now, any inferences or any presumptions that the Committee had, of course, can't properly come before me. I have got to draw my inferences from the testimony produced here, you see? So if there is anything that Mr. Woodall said that Mr. Street didn't testify to, or anything about his manner, or his actions, you certainly will be permitted to testify.

The Witness: Well, I think Mr. Street has covered it all, sir. Mr. Woodall was very emphatic.

The Court: He didn't like what the Committee was doing and he expressed himself?

The Witness: That is right, sir.

Q. (By Mr. Dreifus): How long have you been a member of the Navel Orange Administrative Committee?

A. Five years. This is finishing out my fifth

(Testimony of Jack M. Dungan.)

year. [68] Since it has been reinstated I have been a member ever since.

Q. In your experience, has there been any definite practice established, or has any practice prevailed during your five years on the Committee, concerning—within the orange industry—whether persons who appear as observers customarily appear on their own behalf or in behalf of those handlers who employ them?

Mr. Weikert: That is objected to as calling for a conclusion of the witness.

The Court: Yes, I am going to sustain the objection to the question.

Mr. Dreifus: I have no further questions.

Mr. Weikert: No questions.

The Court: That is all.

(Witness excused.)

Mr. Dreifus: Mr. Coogan is my last witness of these three.

The Court: All right.

MICHAEL COOGAN

called as a witness by the plaintiff in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Michael Coogan.

The Clerk: Have that seat. [69]

(Testimony of Michael Coogan.)

Direct Examination

By Mr. Dreifus:

Q. Mr. Coogan, you have heard the testimony of Mr. Street and Mr. Dungan today?

A. Yes, I have.

Q. What is your occupation?

A. Manager of the Navel Orange Administrative Committee.

Q. And where is your residence?

A. Los Angeles, California.

Q. How long have you been manager of that Committee? A. Since May, 1934.

Q. Now, you attended the two meetings we referred to, in March, 1956? A. Yes.

Q. And you heard everything that went on there? A. Yes.

Q. Can you tell us whether it is your recollection that what Mr. Street and Mr. Dungan have already testified to correctly states what transpired at those two meetings?

A. In context they do. For myself, I don't remember the exact words, but they state it.

Q. As to the two meetings themselves and matters which occurred in the open meetings, do you have anything to add to what Mr. Street and Mr. Dungan have already testified to?

A. Well, I had a conversation with Mr. Woodall after [70] the meeting of March 29th.

Q. It was within the two meetings?

(Testimony of Michael Coogan.)

A. No, it was not within the meeting; I think they have covered that.

Q. Now, did you have a conversation with Mr. Woodall before or after any formal session of those two meetings?

A. I had a conversation with him after the meeting of March 29th. I listened to Mr. Woodall's testimony. It wasn't a private conversation in another room, but after the meeting was over and everybody gathered around, I was talking directly to him and he was talking directly to me, and I don't know whether anybody heard us or not.

Q. Can you state the substance of that conversation?

A. Well, the substance was that Mr. Woodall said that he had a plan whereby he was going to ship his fruit, and I told him as manager he must understand it was my job to catch him if he shipped in excess of the allotment, and he said, "Well, I ain't going to tell you what I am going to do." And I said "Naturally." And he laughed and I laughed, and that was about the conversation.

Q. You said you had been manager since 1934?

A. I did that at the hearing, too. I started to work for the government in May, 1934, and I started to work for the Orange Administrative Committee in May, 1954.

Mr. Dreifus: Thank you. That will be all. [71]

Mr. Weikert: No questions.

The Court: Mr. Coogan, are you the presiding Officer?

(Testimony of Michael Coogan.)

The Witness: No, as manager I am acting secretary, and I prepare the agenda for the chairman.

The Court: And the chairman is chosen from among the members of the Committee?

The Witness: No—yes, the chairman is chosen among the members of the Committee. The chairman usually, has been on the Committee since 1934 a neutral, as we call it, he has no citrus interests and he is appointed by the Secretary of Agriculture.

The Court: I see.

The Witness: And our chairman of the Navel Committee happens to be Ken Smoyer, the farm adviser for Los Angeles County.

The Court: Let me ask you another question: Has it been the practice to make notes, minutes of what these observers say at the meetings?

The Witness: No, sir, not in general. Years ago we used to make verbatim, but even on the committee they don't make notes unless committee action is taken.

The Court: I see.

The Witness: Except the fact it is recorded officially that he is an observer and is present.

The Court: I see. And generally does that simply record [72] his name and where he is from?

The Witness: Just records his name.

The Court: Yes. Thank you. Any further questions?

Mr. Weikert: No, sir. [73]

March 12, 1958—10:00 A.M.

The Court: Are we ready in the Lo Bue case?

WILLIAM LUTHER WOODALL

a witness for defendants, resumed the stand, having been previously duly sworn, and was examined and testified further as follows:

Cross-Examination
(Continued)

Mr. Dreifus: Further cross-examination of Mr. Woodall.

Q. Now, Mr. Woodall, on the same day that you attended the Navel Orange Administrative Committee meeting on March 29, 1956, after that meeting you went to Mr. Weikert's office in Los Angeles, did you not? A. I don't remember.

Q. Did you see Mr. Weikert in his office during the month of March, 1956?

A. I don't remember whether it was March or April. I can't recall the exact date.

Q. Prior to the filing of the 15(A) petition, did you see Mr. Wickert in his office, during either March or April, 1956? A. Yes, sir.

Q. How many trips to Los Angeles did you take during March or April, 1956, during which you saw Mr. Weikert?

A. You ask me how many times I saw Mr. [74] Weikert?

Q. During March or April, 1956.

A. Once is the best I remember, one time.

(Testimony of William Luther Woodall.)

Q. In his office? A. Yes.

Q. Was that on the same day that Mr. Mario Lo Bue signed the 15(A) petition?

A. No, it was prior to that.

Q. Did you see Mr. Weikert on the same day on which you attended the Navel Orange Administrative Committee meeting?

A. I don't remember.

Q. Other than the time you spent in Mr. Weikert's office during March or April, 1956, did you speak to Mr. Weikert on the phone?

A. What time are you talking about?

Q. Did you on any occasion during March or April, 1956, speak to Mr. Weikert on the telephone?

A. Yes.

Q. Where were you at the time you had the phone conversation?

A. Lo Bue Packing House.

Q. At Lindsay? A. Yes.

Q. The one time you visited Mr. Weikert in his office, did you stay in his office all day long?

A. No. [75]

Q. Did you stay in his office four hours of the day?

A. I don't remember the hours or minutes.

Q. Were you there as little as one hour?

A. I don't remember the length of time I was in Mr. Weikert's office.

Q. Did you, while you were in Mr. Weikert's office on this occasion, have any discussion with Mr. Weikert? A. Yes.

(Testimony of William Luther Woodall.)

Q. You talked to him and he talked to you?

A. Yes.

Q. What did you tell him?

A. I didn't tell Mr. Weikert anything, I went to Mr. Weikert for advice.

Q. Did you say any words at all of any kind to Mr. Weikert while you were in his office?

A. Why I talked to Mr. Weikert, yes.

Q. What did you say?

A. Well, it is hard to remember the words I said. I can't tell you the words I said, a conversation that happened two years ago.

Q. Can you remember the substance of what you said?

A. The substance of the conversation was, is there any way, legal right that we can move oranges. We felt our rights was being infringed; they prorated the oranges way past any other year, of the historical life of navel oranges in Tulare [76] County, they were deteriorating very badly, bringing a dollar a box under Southern California oranges, and that was along those lines, the condition of our fruit, and if there was any way we could get relief.

Q. And this is all that you informed Mr. Weikert? A. Informed him?

Q. Well, this is all you told him at the time, in substance?

A. I can't remember every word of the conversation.

(Testimony of William Luther Woodall.)

Q. Now, you mentioned Tulare County navel oranges, and the season being extended. By Tulare County you actually mean Central California navel oranges, don't you?

A. Yes, Tulare County is most of Central California, in Tulare County.

Q. Now, the petition that was later filed, as you understand it—withdraw that question. You understand that the petition that was filed by Lo Bue Brothers briefly sets out that Central California is being discriminated against because the season was made too long? Is that what you understand? Is that a correct statement of what you understood the petition to be about at the time?

A. Ask that question again.

The Court: Read the question.

(Question read.)

A. I don't understand what words—I don't know what [77] words was in the petition.

Q. (By Mr. Dreifus): Well, in substance did you understand that the petition recited in legal words what you told Mr. Weikert was wrong?

A. I only went to Mr. Weikert for advice. As far as the petition, I didn't even read the petition. I don't know what the petition said.

Q. And when you went to see Mr. Weikert for advice you were looking for a way to ship the oranges, weren't you?

A. I was seeing if there was any legal way.

Q. Well, you wanted to ship. We will assume you

(Testimony of William Luther Woodall.)

wanted a legal way, but you wanted to find some way to ship the oranges, did you not?

A. Yes.

Q. Now, during this conference with Mr. Weikert in his office, what were you told by Mr. Weikert in answer to your telling him all of these things?

A. Mr. Weikert advised us that the only way legally it could be done was by filing a 15(A).

Q. Did he advise you that as soon as the 15(A) petition was filed you could start immediately shipping oranges?

A. Yes.

Q. Did he advise you that a 15(A) petition had to be filed in good faith and not for purpose of delay if it was to [78] be effective?

A. I don't remember all the words he told us.

Q. You don't remember him telling you whether or not the 15(A) petition has to be in good faith and not for the purpose of delay?

A. I cannot—the substance of the conversation is the only thing I can remember, and he advised me by filing a 15(A) is the only way we could get relief, was by filing a 15(A).

Q. At the time you had this discussion with Mr. Weikert did you understand that in order the 15(A) petition could be valid, so you could lawfully ship your oranges, that 15(A) petition had to be in good faith and not for the purpose of delay?

A. When I go to an attorney I go for advice and I do as he says. I am not an attorney; I don't know the laws.

Q. Do you personally, or did you personally at

(Testimony of William Luther Woodall.)

that time understand the meaning of the words "good faith"?

A. I don't remember if good faith was even mentioned.

Q. Now, before going down to consult with Mr. Weikert, whose idea was it to go see him, yours or Mr. Mario Lo Bue's, or somebody else's?

A. Well, we had all been talking this over what we thought it was—we thought our constitutional rights was being infringed on by the prorate board due, as I say, to [79] extending our prorate ten weeks past the historical life and the Southern California setup was two weeks past the historical life of their fruit, and the historical life is arrived at at the time all fruit has been shipped in the district, so we were all very bitter that that was being done to us and we were taking great losses. Every two weeks, we was running pools every two weeks and our by-product still was doubling practically every pool, in percentage.

Q. Whose decision was it for you to go to see Mr. Weikert?

A. It was a decision that was arrived by Mr. Lo Bue and I.

Q. What pool do you speak of? Explain what you mean by pool?

A. Well, pool is when you run a certain length of time, the pool—all the growers that pick in that pool is paid the same price for size and grade.

Q. By pool, now just who makes up a pool? Are they growers, handlers, or what?

(Testimony of William Luther Woodall.)

A. Made up by your growers.

Q. Your pool that you speak of here, did any of those people ship any oranges through Lo Bue Brothers Packing House during March, 1956?

A. Yes.

Q. Well, then some of the oranges that were in the 26 [80] carloads that were shipped over the 7th and 8th of April, 1956, came out of that very pool, did they not? A. Out of what pool?

Q. The pool you just spoke about, your pool?

A. I didn't say I had a pool, the packing house has a pool.

Q. Well, the packing house pool, didn't they?

Mr. Weikert: Would you read that question?

(Question read.)

A. Some of whose oranges?

(Question reread.)

Mr. Weikert: If the Court please, I don't believe the witness understands the question. I don't quite understand it myself. I don't know whether counsel understands how a pool operates. They are not just lying around loose, they come out of—

Mr. Dreifus: Your Honor, that is one of the difficulties. I am trying to get into the record just what we mean by the word "pool."

The Court: Let's ask the witness what he means by the word "pool" as used in connection with this marketing order on navel oranges.

Q. (By Mr. Dreifus): As you used the word

(Testimony of William Luther Woodall.)

“pool” in your last several answers, what do you mean by the word “pool”? [81]

A. Well, a pool is where you go out and pick oranges, you run it sometimes two weeks, sometimes 30 days, some people run them a whole season. This year we were running two-week pools and there is a bunch of growers in that pool, some 15 or 18, I don't remember exactly, and they get a pack out, and their fruit as soon as it is run loses its identity, what cars it is in we don't know. He gets so many fancy this size, so many choice this size, so much by-product, and so forth, different grades, so that money is all—comes in and whatever the average of that size or that grade is paid during that pool, that is what the grower gets.

Q. Now, when you said “we run a pool” you mean Lo Bue Packing House runs a pool?

A. Yes, they run pools, and all packing houses run pools.

Q. So the pool you are speaking of here is Lo Bue Packing House pool, is that right?

A. Yes.

Q. And when you say the money comes into the pool, you mean the money comes into Lo Bue Packing House, to go to members of the pool?

A. Yes.

The Court: Let me ask you, is there a two-weeks period in which the oranges are gathered from the growers, and then after the two-week period the oranges that have been thus [82] gathered are shipped, or is there a constant shipment during

(Testimony of William Luther Woodall.)

that two-week period of the oranges, as they come in from the various growers?

The Witness: Well, you start—your pool is from the picking date to the end, and you are shipping all the time in the pool, from the day you start to pick and pack; in fact, you don't start to ship until you start to pack, but from the day you start that pool and start picking and packing, why, that is the starting of the pool, and then like you have 10,000 cartons of one—26s, and you take that average and that is what the growers is paid for that many size of fancy that he has.

The Court: Well, do you determine in advance that during a given two-week period there will be "X" number of cartons of oranges shipped?

The Witness: Well, yes. There will be whatever was picked in that pool shipped, or put in storage.

Q. (By Mr. Dreifus): Now, Mr. Woodall, coming back to the subject we were on, you said the pool decided that you would go to Los Angeles and see Mr. Weikert on the occasion that you went down there to see him, is that right?

The Court: Well, I think my record shows that he said that he and Mr. Lo Bue talked it over.

Mr. Dreifus: I am sorry; I withdraw the question. [83]

The Court: That is my understanding of his testimony. Is that right?

The Witness: That is right.

Q. (By Mr. Dreifus): You and Mario Lo Bue talked it over, your decision to go to Los Angeles to

(Testimony of William Luther Woodall.)

see Mr. Weikert? A. Yes.

Q. Which one of you two first suggested in that conversation that you were going to Los Angeles to see Mr. Weikert?

A. I believe Mr. Lo Bue went with me. I am not sure, but I believe he did. I am not definitely sure about it.

Mr. Dreifus: Repeat the question.

(Question read.)

A. Oh, I don't remember.

Q. Did Mr. Mario Lo Bue order you to go to Los Angeles to see Mr. Weikert?

A. I don't know whether he went with me or not. He didn't order me. It was just a general understanding if I did go, but I think Mr. Lo Bue went with me. I am not sure.

Q. In running the Lo Bue Packing House at this time, and prior to this time, was it customary for Mr. Mario Lo Bue to order you to go see an attorney about the affairs of Lo Bue Packing House?

A. I never make any decisions for Lo Bue Packing Company. I never act for Lo Bue Packing Company unless I have [84] instructions from Mr. Lo Bue, Mario Lo Bue. Does that answer your question?

Q. You are the sales manager of Lo Bue Brothers, are you not? A. Yes.

Q. How long have you been the sales manager?

A. Oh, some four years, more or less.

(Testimony of William Luther Woodall.)

Q. As sales manager at the time in question, which is March and April, 1956, you were engaged to sell the oranges to be packed and shipped by Lo Bue Brothers, were you not? A. Yes.

Q. By selling, that means you have authority to go and make agreements to sell with the various customers, is that correct?

A. Well, I either turn them over to A. Arena & Company, or sell them myself there at the packing house.

Q. By selling them yourself, you mean you sell them to ultimate customers?

A. Yes, customers that we have.

Q. Could you name some typical customers that you were selling to at the time?

A. Name some customers?

Q. Yes.

A. Well, Safeway Stores; Sam Perricone in Los Angeles, that is our main outlet for the local business. [85]

Q. Now you have been employed always as a full time employee of Lo Bue Brothers, have you not?

A. When we are packing I am always there.

Q. By full time, does Lo Bue pay you for 40 hours a week whether the 40 hours are spent in the packing house or in Los Angeles, or elsewhere on Lo Bue's business?

Mr. Weikert: Objected to as immaterial.

The Court: Well, I don't think that particular question is material. I will sustain the objection.

(Testimony of William Luther Woodall.)

Q. (By Mr. Dreifus): Would you describe what your general duties were during March and April of 1956, as sales manager of Lo Bue Brothers?

A. I just described them. I—what fruit I can't sell f.o.b. here I turn over to A. Arena & Company to sell.

Q. Do you have authority to make sales of oranges without consulting Mr. Mario Lo Bue on each individual sale? A. Yes.

Q. You have authority to negotiate prices then, do you not? A. On oranges?

Q. Yes. A. Yes, sir.

The Court: Do you engage in any other activities besides your duties as sales manager for Lo Bue Brothers? [86]

The Witness: Well, I help check the grades and see we are putting out—

The Court: No, aside from anything you do for Lo Bue Brothers, do you engage in any other activity?

The Witness: Other than sell fruit?

The Court: Yes.

The Witness: I contact growers.

The Court: No, any activities other than the Lo Bue Brothers. In other words, do you carry on a real estate business?

The Witness: Oh, no, sir.

The Court: Carry on a farming business? What do you do?

The Witness: Nothing but the packing house

(Testimony of William Luther Woodall.)

business, and I have no financial dealings of any kind.

The Court: No, but as I understand you have an orange grove of your own?

The Witness: Yes, sir.

The Court: Do you devote any time to the orange grove?

The Witness: Oh, yes.

The Court: Well, do you do any other activity separate and apart, or in addition to the activities that you are engaged in for Lo Bue Brothers?

The Witness: Well, I have my own ranches, my partnership ranches that I look after. That is about all.

The Court: All right. [87]

Q. (By Mr. Dreifus): The Lo Bue packing house pool that you described before, did you at the time in question here have anything to do with the running of that pool, or the managing of the growers in it?

A. Well, we just picked all of our fruit that we had left in that pool.

Q. Well, did you have anything to do with the picking of the fruit by the members of the pool?

A. I don't know how to answer that.

The Court: Do you, among your duties, contact the growers for any purpose?

The Witness: Well, it was understood that all the growers we had left would get in the last pool.

The Court: Well——

The Witness: Sometimes I talked with them, and

(Testimony of William Luther Woodall.)

said "We will pick some of your crop tomorrow" or two days or four days later.

The Court: All right.

Q. (By Mr. Dreifus): If you can recall, what was the salary or income you received from Lo Bue Brothers in March, 1956?

Mr. Weikert: That is objected to as wholly immaterial.

The Court: I don't see that it is material. It is my understanding from this witness' testimony that he devotes [88] all of his time that is required to carry on his activities with Lo Bue Brothers, and then apparently he is free to do what work he might do in connection with his own orange groves, or those in which he has a partnership interest. In other words, I take it he is a full time, so-called full time employee of Lo Bue Brothers, and as the work requires it he works every day and all day long, other days there may be nothing to do he might do something about his ranches.

The Witness: That is right.

The Court: But the Lo Bue Brother work has preference, is that right?

The Witness: Yes.

Mr. Dreifus: Your Honor, my question was directed at this: Mr. Woodall is attempting to minimize his role in this whole thing. However, I will withdraw the question.

The Court: I don't see, as long as the indication is the witness is a full time employee in the sense

(Testimony of William Luther Woodall.)

in which I have used the term, whether he is overpaid or underpaid would be material.

Mr. Dreifus: I will withdraw the question, your Honor.

Q. Mr. Woodall, how old are you?

A. I will be 50 September.

Q. How long have you been connected by any employment or any capacity with the orange business, growing or handling?

A. Growing and handling, managing packing houses, '28 [89] or '32 I started managing packing houses. I don't remember exactly.

Q. In other words, would it be fair to say at least something more than 25 years? A. Yes.

Q. Prior to being employed by Lo Bue Brothers, immediately prior thereto, were you employed or were you in any way connected with the orange business? A. Yes, sir.

Q. With whom or for whom were you so connected?

A. Before I went with Lo Bue I was with Paramount Citrus.

Q. What was your capacity there?

A. District manager.

Q. And how long were you with Paramount Citrus? A. One year.

Q. Prior to that time were you connected with the orange business in any way?

A. Yes, sir, Independent Growers at Lindsay.

Q. What was your capacity with Independent Growers? A. I was managing.

(Testimony of William Luther Woodall.)

Q. And how long were you with them?

A. Well, I don't know whether it was three or four years.

Q. And prior to that time were you connected with the orange business?

A. Well, five years prior to that I wasn't in the orange [90] business at all.

Q. Well, going back even further, were you in the orange business? A. Yes.

Q. With whom?

A. Well, I was district manager for Western Fruit Growers in Redlands from '48 to '43 or '44.

Q. Now, after the fruit was shipped on the 7th and 8th of April, 1956—withdraw that. After the conference with Mr. Weikert in his office, did you have a telephone conversation with Mr. Weikert?

A. Yes.

Q. Can you recall whether that was on a day prior to the dates of the shipments of the oranges in question here? A. Yes.

Q. Can you recall the date on which that telephone conversation occurred?

A. Well, I don't know just the exact date, but I know it was before the fruit was shipped.

Q. Was it on Friday, the 6th of April, 1956?

A. I don't know the exact date, I told you.

Q. In that telephone conversation, did you call Mr. Weikert, or did Mr. Weikert call you?

A. I don't—he didn't call me, I am quite sure. If he called anybody it was Mr. Lo Bue, and we both talked on [91] the same phone. We both came

(Testimony of William Luther Woodall.)

on the same phone, we have extensions on the phone. We were both talking to him.

Q. Can you recall the substance of the conversation you heard in that telephone conversation between, Mr. Lo Bue and Mr. Weikert?

A. Not word for word I can't.

Q. Can you recall the substance of what was said?

A. That the 15(A) had been filed, and we was at liberty to ship oranges.

Q. You were at liberty to ship oranges, and was any specific date or time mentioned as to when you would be at liberty to ship oranges?

A. The next day, I believe. It might have been two days. We was advised we could ship, I don't remember exactly what hour or day he said.

Q. Well, did you begin shipping on the day that was referred to in the conversation, whatever day it might have been?

A. We began shipping the day Mr. Weikert advised us we could ship.

Q. Was that all the substance of the conversation? A. Yes, that I can remember.

Q. Was anything said in the conversation as to whether or not there might be a court order to stop you from shipping oranges?

A. Yes, he said we could ship until there was a court [92] order restraining us from shipping.

Q. Were you told to expect the court order within a few days?

A. I don't remember the words, word for word,

(Testimony of William Luther Woodall.)

the substance of the conversation was we could ship oranges until a court order was issued and for us not to ship any more oranges after the court order was received.

Mr. Dreifus: Repeat the question.

(Question read.)

The Court: Then read the answer, too.

(Answer read.)

The Witness: That was the meaning of the conversation.

The Court: Does that answer your question?

Mr. Dreifus: I will reframe the question.

Q. Were you told that it was probable or likely, or words to that effect, that a court order would be quickly issued and served on you?

A. I can't remember the exact words. I can only testify to the substance of the conversation.

Q. At the time you had this conversation, and at the time the oranges were shipped on Saturday the 7th and Sunday the 8th, did you expect in your own mind to receive a court order on Saturday or Sunday?

A. I had—I didn't know when the court order—I had no way of telling. [93]

Q. Did you, or did you not, expect on that Saturday or Sunday, while you were shipping the oranges, to receive a court order, during those two days?

Mr. Weikert: If the Court please, the witness

(Testimony of William Luther Woodall.)

said that he had no means of knowing. I believe the question has been asked and answered.

Mr. Dreifus: I am asking for his state of mind, your Honor.

The Court: Well, hasn't he given it? He said that he was advised they could start shipping, that if there was a court order they would have to stop shipping.

Mr. Dreifus: Perhaps I can rephrase the question. I will withdraw the question and rephrase it.

Q. Did you on that week end, of the 7th and 8th of April, 1956, expect to receive a court order prior to Monday, the 9th?

A. I can't think of all of the things that ran through my mind those days. I was just doing what our attorney told us to do, and I don't remember what I thought.

* * *

Q. (By Mr. Dreifus): Sometime later, after the shipment of oranges took place, you attended an administrative hearing on the 15(A) petition in Los Angeles, did you not? [94]

A. Yes, sir.

Mr. Dreifus: We will stipulate, your Honor, that that hearing occurred on June 14, 1956.

Mr. Weikert: I think it is in the stipulation of facts. Anyway, that is correct.

Mr. Dreifus: Yes.

Q. Assuming the date of that hearing to be June 14, 1956, as was stipulated to, did you between the

(Testimony of William Luther Woodall.)

time you spoke to Mr. Weikert in the telephone conversation prior to the shipment of the oranges see or speak to Mr. Weikert from the time of that telephone conversation to the date of the administrative hearing?

Mr. Weikert: I object to that as immaterial, if the Court please. This is something after the fact which are here before the Court. It is immaterial since it deals with something that did or did not take place after the facts which are the subject matter of this case. If counsel will state what he has in mind, perhaps the materiality will appear, but as of now I object to it as immaterial.

Mr. Dreifus: This question and the subject, your Honor, is addressed to the extent of preparation made by this witness, and others with him, for the 15(A) hearing. It is after the fact of the shipment of the oranges, but I believe it is a part of the whole picture, in showing what these persons had in mind as to just how important they felt the [95] petition was on the merits.

The Court: I will overrule the objection. The question is, before this hearing on June 14th, and after the shipment of the oranges, did you talk to Mr. Weikert about this general subject?

The Witness: I don't remember.

Q. (By Mr. Dreifus): Did you at any time prior to the hearing on June 14, 1956, and after the telephone conversation, see Mr. Weikert in his office in Los Angeles?

(Testimony of William Luther Woodall.)

Mr. Weikert: Objected to as immaterial. Counsel apparently is trying to show that I didn't make proper preparation for the 15(A) petition hearing, at which counsel was not present. Mr. Griffin was my opposing counsel at that time, and as I recall we spent a full day in hearing, and after that exceptions and briefs were filed in the ordinary course of events. I just don't see the materiality of it.

The Court: I am going to overrule the objection. Read the question, Miss Schulke.

(Question read.)

A. Well, I—I don't remember. I saw him before we went down to the hearing that morning, the day of the 14th, or whenever the hearing was, but I don't remember seeing Mr. Weikert.

Q. (By Mr. Dreifus): Now, the hearing lasted one day, did it not? [96] A. Yes, sir.

Q. So other than seeing him the very same morning the hearing started you cannot remember seeing Mr. Weikert during the period we mentioned?

A. Between the time the fruit was shipped and the time of the hearing?

Q. Correct. A. I don't remember.

Q. Did you in any manner during that period, between the shipment of the fruit and the time of the hearing, communicate with Mr. Weikert, by letter for example?

A. I don't think I ever wrote Mr. Weikert a letter.

(Testimony of William Luther Woodall.)

Q. You yourself testified at that administrative hearing, did you not? A. Yes.

Q. Mr. Mario Lo Bue also testified?

A. Yes.

Q. You and Mr. Mario Lo Bue were present at that administrative hearing together?

A. Yes.

Q. Did you provide Mr. Weikert with the names of any other witnesses in your behalf from Central California to testify at that hearing?

Mr. Weikert: That is objected to as immaterial, and assuming that there is something not in evidence, namely that there were other witnesses. [97]

The Court: I don't know exactly what counsel has in mind, unless it could be that after the filing of the petition and after the shipment of the oranges, this witness really had no further interest in the matter, and that the hearing from their standpoint was just a pro forma hearing, and that might reflect on whether there was good faith at the time of the filing of the petition.

Mr. Dreifus: That is our purpose, your Honor.

The Court: I see. Well, I will overrule the objection. Do you recall whether you furnished Mr. Weikert the names of any witnesses to appear at the hearing?

The Witness: I don't remember. I only did things my counsel told me to do, instructed me to do.

Mr. Weikert: I didn't hear the answer.

The Witness: I said I only did those things our counsel instructed us to do.

(Testimony of William Luther Woodall.)

Q. (By Mr. Dreifus): Prior to the hearing did you furnish Mr. Weikert with any evidence of any other kind, such as any documents or papers, which would be in your behalf?

Mr. Weikert: If the Court please, I object to this upon the ground it is not the best evidence. If counsel wishes to introduce in evidence the transcript of hearing on the 15(A) petition, together with exhibits introduced by all witnesses, I will have no objection to his doing so. [98]

Mr. Dreifus: Your Honor——

The Court: I will overrule the objection on the theory that I have heretofore mentioned.

Mr. Dreifus: Read the question.

(Question read.)

The Court: In other words, did you assist Mr. Weikert in preparation for the hearing by giving him information or furnishing documents, or names of witnesses?

A. I can't remember. I know I asked him what we should do, and we did what he told us to do. That is the only thing I know, your Honor. That is the only way I know how to answer the question, because I can't remember. I don't remember that far back. I talked to him about our deterioration and how much our elimination was increasing every two weeks, and I did whatever he said or suggested—or asked me anything I could do, that I know, but I don't know—can't remember exactly what was said or done.

(Testimony of William Luther Woodall.)

Q. (By Mr. Dreifus): At that hearing, or in any conversation with Mr. Weikert prior to the hearing, did Mr. Weikert inform you that you had a right to appeal an administrative decision to the District Court?

A. I don't remember. [99]

* * *

Q. (By Mr. Dreifus): Did you find out later that the judicial officer of the Department of Agriculture decided against your 15(A) petition?

A. Mr. Weikert——

Q. The Lo Bue 15(A) petition?

A. Mr. Weikert informed me.

Q. Now, going back to the conversations that you had with Mr. Weikert, both in his office and over the telephone, and also at the administrative hearing, did Mr. Weikert ever tell you what the chances were that you would get a favorable decision on your petition from the administrative hearing officer of the Department of Agriculture?

Mr. Weikert: If the Court please, I object to that question as calling for the conclusion of the witness. I certainly was not equipped with a crystal ball.

The Court: I think I will sustain the objection to that question. [100]

Q. (By Mr. Dreifus): Now, in your telephone conversation with Mr. Weikert, when he told you the petition was on file and that as of a certain date and hour you could begin shipping oranges,

(Testimony of William Luther Woodall.)

did Mr. Weikert tell you by what means he was so sure the petition was on file?

A. He told me he had mailed it and it was on file.

Q. He didn't tell you whether or not he had made a telephone call to the hearing clerk to see whether the petition had been received?

A. No, he didn't tell me that.

Mr. Dreifus: That is all, your Honor.

Mr. Weikert: That is all.

The Court: That is all.

(Witness excused.)

Mr. Weikert: With the Court's permission, I would like to testify for the defendants.

Mr. Dreifus: No objection, your Honor.

G. V. WEIKERT

a witness for the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Witness: My name is G. V. Weikert. I am an attorney at law, licensed to practice in all the courts of the State of California, and have been practicing in Los Angeles since [101] 1926. I am also the attorney of record for the defendants in this action.

I was consulted some time during the month of March by Mr. Woodall, in my office in Los Angeles, as sales manager of Lo Bue Brothers of

(Testimony of G. V. Weikert.)

Lindsay. And Mr. Woodall told me at that time that Lo Bue Brothers had a problem with the navel oranges which it was handling for its growers, in that the normal shipping season for navel oranges in Central California ends around April 1st, and the Navel Orange Administrative Committee was proposing to restrict shipments for approximately ten weeks beyond that period and that the fruit was deteriorating and dropping, and would continue to deteriorate and drop to such an extent that it would become practically worthless, and that at the same time the Navel Orange Administrative Committee was proposing to restrict shipments of Southern California navel oranges no more than two weeks beyond their historical life.

Mr. Woodall also told me that this action was being taken by the Navel Orange Administrative Committee while Central California had only one representative on the Committee, all the rest being Southern California representatives, and he felt that there was discrimination against Central California. He asked me what could be done about it, if anything.

I told him that on his statement it appeared to me that [102] there was grave doubt as to the legality of the Committee's action, and that the only thing that could be done was to follow the administrative procedure outlined by the Act, which consisted of filing what was known as a 15(A) petition with the Secretary of Agriculture, on which

(Testimony of G. V. Weikert.)

a hearing would ultimately be held and a decision eventually be made.

Mr. Woodall said that he didn't see that that would do much good because by the time there was a decision it would be long past the season anyway and all the damage would have been incurred.

I informed Mr. Woodall that the statute makes provision for relief under these circumstances. I told him that the statute provides that where a 15(A) petition is filed in good faith the order or allotment complained of is in effect suspended until there is a decision on the petition, and that the petitioner is exempted from penalties prescribed by the Act.

I also told him that in the only cases that I knew of, which were two cases decided in this court in 1944 and which had never been appealed and had become final, the immunity provided by the statute had been construed to extend to civil penalties as well as criminal penalties, and that once a 15(A) petition was filed in good faith, the petitioner was free to disregard allotments unless and until he was enjoined from further shipment. [103]

Mr. Woodall said that he would go back to Lindsay, discuss the matter with Mr. Mario Lo Bue, and I would hear from them later.

I did hear from them later. Mr. Mario Lo Bue telephoned me from Lindsay, and Mr. Woodall was on the extension in Lindsay, and they told me to go ahead and present a 15(A) petition along the lines we had discussed.

(Testimony of G. V. Weikert.)

After I had prepared the petition, I telephoned Mr. Lo Bue at Lindsay and told him it was ready. He came down, read it, signed it, and verified it in my office, and went back to Lindsay.

I mailed it that day to Washington, airmail at the—airmail registered, and late the next day I telephoned Mr. Lo Bue at Lindsay, with Mr. Woodall on the extension at Lindsay, and told them both that by now the petition would be on file with the Secretary of Agriculture, and if they had fruit to ship in excess of their allotment they could begin the next day to make such shipments and could continue unless and until they received an injunction or restraining order stopping them.

I would like to state further that I have had frequent communications over the years with departments and agencies of the federal government in Washington, and also with many individuals in Washington, D.C., and it has been my experience that airmail deposited in the mail at Los Angeles one day is delivered invariably in Washington to the addressee the next [104] day.

I have no knowledge as to the manner in which mail for the Department of Agriculture is handled in Washington. I have no knowledge of any alleged practice of holding mail for the Department of Agriculture received on a Friday after 2:00 p.m. until the following Monday. I have no knowledge that the entire Department of Agriculture is closed all day Saturday.

I would like to state further that over the years

(Testimony of G. V. Weikert.)

I have prepared and filed quite a number of 15(A) petitions for various shippers, raising various legal questions with regard to various marketing orders, not only with regard to oranges, but also lemons and other commodities, although this is the only one I filed on this particular order.

I would also state in that connection that it has been my experience in filing these 15(A) petitions that they were delivered in Washington the next day. I have always proceeded upon the assumption that they were received and filed the day after they were airmailed to Washington, and this is the first occasion on which any question has ever been raised by the government, or the Department of Agriculture, with regard to the filing date.

You may cross-examine.

Mr. Dreifus: One moment, your Honor. There is a great deal of material here. [105]

Cross-Examination

By Mr. Dreifus:

Q. Mr. Weikert, at the time that you consulted with the defendants and prepared the petition and mailed it to Washington, were you familiar with the rules of practice prescribed by the Secretary of Agriculture covering the filing of petitions under Section 8c(15)(A) of the Agricultural Marketing Act, as amended, as those regulations are published in Title 7 of the Code of Federal Regulations?

A. I am not sure that I was familiar with all of the rules of practice that were in effect at that

(Testimony of G. V. Weikert.)

time. They change them so often and sometimes they don't even publish the new ones when they have been changed. I had that experience just last week, I found that the latest published rules of practice of the Department of Agriculture do not include all of the current amendments. I discovered that in a P.A.C.A. hearing in which I appeared in Los Angeles last week. The hearing examiner himself didn't know what the latest regulations were.

Mr. Dreifus: Your Honor, I move to strike—I withdraw the motion.

The Court: Well, I will strike the statement that the hearing officer didn't know what the latest regulations were. I will strike that. [106]

Q. (By Mr. Dreifus): In particular, Mr. Weikert, were you familiar with Section 900.69 of Title 7, of Code of Federal Regulations, sub-section (d), which reads in substance that any petition filed under Section 900.52, which is (608c(15)(A)) shall be deemed to be filed when it is received by the hearing clerk?

A. I can't say that I am familiar with that. I don't know when it was adopted, and the number of the section I do not know.

Q. Assuming that this was published in the Federal Regulations, in the Federal Register and in the Code of Federal Regulations prior to the date on which the 15(A) petition was filed here, this would be binding and have the force of law, in your opinion as an attorney, would it not?

(Testimony of G. V. Weikert.)

A. Assuming that it had been so published, I presume that it would, yes. But I do not subscribe to the Federal Register, and I do not believe even the Los Angeles County Law Library has a complete set of the Federal Register.

Mr. Dreifus: I move to strike the last statement, your Honor.

The Court: I will strike the statement regarding the Los Angeles Public Library, I will strike that.

Q. (By Mr. Dreifus): Mr. Weikert, in the last 20 years in your practice of law has it dealt in any proportion with cases which [107] arise out of the activities of the Department of Agriculture?

A. To a very considerable extent. I specialize in agricultural marketing, and the fruit and production business, and its problems generally.

Q. You stated on direct examination that you had filed many 15(A) petitions? A. Correct.

Q. At any time after you mailed the petition to Washington on Thursday or Friday, the 5th or 6th of April, 1956, did you call the hearing clerk's office on the phone to see if the petition was on file?

A. It was the 5th it was mailed. No, I did not. I have never spoken to the hearing clerk's office at any time on any subject.

Q. You testified on direct examination—if my recollection of it is not correct, please correct me—that you advised the defendants that they could ship their oranges only after the filing in good faith of a 15(A) petition, in good faith and not for delay, is that correct? A. That is right.

(Testimony of G. V. Weikert.)

Q. Now, aside from the advice that you gave them, do you know whether or not this particular 15(A) petition, the subject of this discussion, was filed in good faith by these defendants?

A. In my opinion, and so far as my knowledge extends, [108] it was.

Q. Do you know whether it was filed for the purpose of obtaining delay, as that word is used in Section 8c(14) of the Marketing Act?

A. In a situation of this kind I don't think the word "delay" is applicable. There was nothing that could be delayed by filing such a petition. I think the only portion of that section that is applicable is the good faith portion of it.

Q. Was this petition filed for the purpose of obtaining an opportunity, immediately after the filing of the petition and prior to the government obtaining a temporary restraining order, in which the defendants could ship oranges in excess of what would otherwise be a binding prorate allotment?

A. No, it was filed for the purpose of obtaining a ruling upon which I believed to be a unique and substantial and meritorious question of law, based upon a very substantial complaint and injury, and in filing it I advised the petitioners that they had every right to avail themselves of the privilege given them by the Congress in this legislation of disregarding the allotment until and unless they were enjoined.

Q. At the time Mr. Woodall discussed with you

(Testimony of G. V. Weikert.)

the prospect of filing the petition, and at the time Mr. Lo Bue signed the petition, and in the course of making such [109] arrangements as you may have made with them for representing them in this matter, was it made a part of your arrangement that an adverse decision on the petition would be appealed to the district court?

A. No, we didn't anticipate an adverse decision. We didn't know what the decision would be, and we would cross that bridge when we came to it.

Mr. Dreifus: No further questions, your Honor.

(Witness excused.)

Mr. Weikert: The defendants rest, your Honor.

The Court: All right.

Mr. Dreifus: Has the defense rested?

The Court: Yes.

Mr. Dreifus: We have a little bit of evidence we would like to put on. I have one witness who is waiting. [110]

* * *

Afternoon Session—2:00 P.M.

Mr. Dreifus: I understand the defendants have rested their case?

Mr. Weikert: Right.

Mr. Dreifus: In further rebuttal the plaintiff calls Mr. Beard.

WILFORD S. BEARD

called by the plaintiff in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Wilford S. Beard, Special Agent, Agricultural Marketing Service, Internal Audit Division, United States Department of Agriculture.

Direct Examination

By Mr. Dreifus:

Q. What is your residence, Mr. Beard?

A. Los Angeles, California.

Q. And how long have you been a special agent of the Internal Audit Division of the Department of Agriculture?

A. I have been in my present capacity approximately twenty years; the agency name changes.

Q. Calling your attention to the month of April, 1956, did you during the week beginning April 9, 1956, have occasion to come in contact with Mr. Mario Lo Bue? [111]

A. Yes.

Q. Do you know Mr. Mario Lo Bue?

A. Yes, I do.

Q. Would you identify him?

A. Mr. Lo Bue in the middle there.

Q. Do you also know Mr. William L. Woodall?

A. Yes, I do.

Q. Is he present?

A. No, he isn't. Not the one I know.

Mr. Weikert: I don't hear you.

The Witness: No.

(Testimony of Wilford S. Beard.)

The Court: He said no, not the one he knows. Was that your answer?

The Witness: Yes.

Q. (By Mr. Dreifus): Would you point out Mr. Lo Bue in the courtroom, exactly?

A. Mr. Lo Bue is seated between the two gentlemen, between Mr. Weikert and the other man.

The Court: Let the record show he has identified Mario Lo Bue.

Q. (By Mr. Dreifus): Now, calling your particular attention to April 10, 1956, did you see Mr. Lo Bue on that day? A. Yes. [112]

Q. Where, and under what circumstances, and what time?

A. On a Tuesday, April 10th, I called on Mr. Lo Bue at his packing house in my official capacity approximately——

Q. And——

The Court: Wait a minute, I don't think he had finished.

The Witness: ——approximately three p.m.

Q. (By Mr. Dreifus): And did you have a conversation with Mr. Lo Bue?

A. Yes, I did.

Q. Could you relate that conversation, what you said and what he said?

A. Yes. I inquired as to the supply of oranges on the platform in Lo Bue Brothers Packing House, on Sweetbriar Street, I believe it is 221 Sweetbriar, Lindsay, as to what disposition he intended to make of them, and he told me that he was

(Testimony of Wilford S. Beard.)

going to sell them, that the previous week, on a Thursday, he had engaged the services of an attorney, Mr. Weikert, and that Mr. Weikert had prepared a document, a petition which he had signed on behalf of the partnership and that at that time Mr. Wiekert advised him that it would be airmailed and under no circumstances was he to in any way violate or exceed his allotment before Saturday, but after that date he was free. He didn't—wasn't compelled to comply with the regulations of that marketing order until such time as ordered to do so by the court. [113]

Q. Is that all of the conversation?

A. That was the extent of the conversation.

Q. Now, on the 12th of April, 1956, did you have further occasion to see Mr. Lo Bue?

A. Yes.

Q. And what were the circumstances, and where did it occur?

A. In that instance, in my official capacity I served him with a restraining order at his office, also to his brothers, Joseph Lo Bue and Fred Lo Bue.

Q. Was that a restraining order issued by this Court? A. Yes.

Q. Did you have a conversation with him at that time? A. Yes.

Q. Where did it take place?

A. It took place in the office.

Q. And was anyone else present?

A. Just the three brothers.

(Testimony of Wilford S. Beard.)

Q. Do you know the names of the other brothers?

A. Yes, I do, Joseph and Fred.

Q. And what was said at that time?

A. The same thing as was related to me on the 10th. He didn't enlarge on it. He explained that he had signed this document on behalf of the partnership, and they were not to violate prior to it being received in Washington. [114] They specifically were not to violate prior to the Saturday, the 7th, and that was the extent of the conversation.

Mr. Dreifus: That is all, your Honor.

Mr. Weikert: No questions.

The Court: That is all, Mr. Beard.

(Witness excused.)

Mr. Dreifus: At this time the plaintiff offers in evidence as Plaintiff's Exhibit 2, which I believe is next in order, is that correct?

The Clerk: That is right.

Mr. Dreifus: The following paragraphs of the first stipulation, namely, paragraphs 17 through 22 of the Stipulation of Facts, inclusive, and as Exhibit 3——

The Court: Let's see, that is paragraphs 17, 18, 19, 20——

Mr. Dreifus: 21 and 22. I believe 22 is the last paragraph in the stipulation of facts.

The Court: All right, those paragraphs of the Stipulation of Facts filed on October 11th, designated as paragraphs 17, 18, 19, 20, 21, and 22 will

be received and marked Plaintiff's Exhibit No. 2 in evidence.

(The paragraphs referred to were marked as Plaintiff's Exhibit 2, and were received in evidence.)

Mr. Dreifus: As Plaintiff's Exhibit 3 the plaintiff offers the following paragraphs of the supplementary stipulation of facts, namely, paragraphs 1, 2, 3, 4, 5, 6, [115] 7, and 8, which I believe are all the paragraphs in the stipulation.

Mr. Weikert: The Court will note that in each of these stipulations, that is the first stipulation of facts, and the supplementary stipulation of facts, the right of the parties to object to the introduction of any of these paragraphs is reserved.

The Court: That is right.

Mr. Weikert: Therefore I object to the introduction into evidence of the portions of the first stipulation, and the second or supplementary stipulation now offered, on the grounds they are incompetent, irrelevant and immaterial, that they contain nothing but conclusions on the part of the witnesses, and that they are hearsay as to the defendants.

Mr. Driefus: Would counsel specify which paragraphs he is referring to? Are you referring to the paragraphs I just offered?

Mr. Weikert: Yes, to all—we stipulated that if these various witnesses were called in person, they would testify to these matters. Now, I am objecting

to the receipt of those matters in evidence on the grounds just stated.

Mr. Dreifus: Oh.

The Court: I think for the record, your objection also included the offer of the paragraphs that we have designated as Plaintiff's Exhibit 2; is that right? Did your objection [116] include the——

Mr. Weikert: Yes.

The Court: I will let your objection precede my ruling with respect to the receipt in evidence of Plaintiff's Exhibit No. 2, and——

Mr. Weikert: Pardon me, before your Honor rules, I want to straighten one thing out with counsel. I notice his offer includes paragraph 8 of the second stipulation, which is merely a stipulation that the record of the administrative proceedings on file with the hearing clerk is authentic. That is in another category.

Mr. Dreifus: I have another exhibit to offer.

Mr. Weikert: I wondered if you wanted to include that in this particular offer.

Mr. Dreifus: All right, I will limit my offer of Plaintiff's Exhibit 3 to the first seven paragraphs of the second stipulation, your Honor.

Mr. Weikert: Yes, that puts them all in the same category, namely, that both Exhibits 2 and 3 consist of the testimony which it is stipulated would have been given by various witnesses in Washington had they been called, and my objection is directed to the relevancy, materiality and competence of that testimony, if given, and particularly

that it consists mainly of conclusions and that it is hearsay as to the defendants. [117]

The Court: All right. I will overrule the objections, and will receive paragraphs 1 through 7, of the supplementary stipulation of facts filed in this court on October 30, 1957, and that will be marked Plaintiff's Exhibit No. 3.

(The paragraphs referred to were marked as Plaintiff's Exhibit No. 3, and were received in evidence.)

Mr. Dreifus: Yes, your Honor. Plaintiff's Exhibit 2 has already been received, I understand?

The Court: Yes, that was received and I permitted Mr. Weikert's objection to precede my ruling, and then overruled the objection, and it is admitted as Plaintiff's Exhibit No. 2 in evidence.

Mr. Dreifus: As Plaintiff's Exhibit 4, I offer in evidence paragraph 8 of the supplemental stipulation.

Mr. Weikert: No objection to that.

The Court: All right, it will be received then and marked Plaintiff's Exhibit No. 4 in evidence.

(The paragraph referred to was marked as Plaintiff's Exhibit No. 4, and was received in evidence.)

Mr. Dreifus: As Plaintiff's Exhibit No. 5 I offer in evidence the transcript, of pages 1 through 140, of a hearing held June 14, 1956, in Los Angeles, California, before Glenn J. Gifford, Presiding Offi-

cer of the United States Department of Agriculture, on AMA Docket No. 14-1.

Mr. Weikert: To which I object unless all exhibits [118] which were received and which are a part of that transcript are also included.

Mr. Dreifus: I am going to come to that, your Honor. For clerical reasons I wanted to separate the exhibits.

Mr. Weikert: I don't want them piecemeal.

The Court: Do you intend to offer the other documents?

Mr. Dreifus: Yes. I will offer them as a separate exhibit. We have a reproduction problem.

The Court: Based on counsel's statement then you have no objection to this transcript?

Mr. Weikert: No.

The Court: That will be received and marked Plaintiff's Exhibit No. 5.

(The transcript referred to was marked as Plaintiff's Exhibit No. 5, and was received in evidence.)

Mr. Dreifus: As Plaintiff's Exhibit 6 I offer in evidence certain documents, presently marked as follows: U. S. Department of Agriculture, AMA No. 14-1, Exhibit Numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10.

Mr. Weinkert: Is that all the exhibits?

Mr. Dreifus: That is the total number of exhibits in the original file.

Mr. Weikert: I have no objection.

The Court: They will be received and marked

Plaintiff's Exhibit No. 5 which consists of exhibits 1, 2, 3, 4, 5, 6, [119] 7, 8, 9, and 10 which were received at the administrative hearing.

The Clerk: That is Exhibit 6?

The Court: That will be Plaintiff's Exhibit 6.

(The documents referred to were marked as Plaintiff's Exhibit No. 6, and were received in evidence.)

Mr. Dreifus: As Plaintiff's Exhibit 7, I offer in evidence the certificate of Presiding Officer of the United States Department of Agriculture, Docket No. AMA No. 14-1 consisting of four pages of typographical and clerical corrections to the record of the administrative hearing.

Mr. Weikert: No objection.

The Court: It will be received and marked Plaintiff's Exhibit No. 7.

(The document referred to was marked as Plaintiff's Exhibit No. 7, and was received in evidence.)

Mr. Dreifus: With the permission of the Court, may Plaintiff's Exhibits 6 and 7 be withdrawn temporarily in order that they may be reproduced and true photostatic copies substituted therefor?

Mr. Weikert: No objection.

The Court: That is satisfactory.

Mr. Dreifus: The plaintiff rests its case.

Mr. Weikert: Defendants rest.

Mr. Dreifus: May I have a moment, your Honor? [120]

The Court: Yes.

Mr. Dreifus: Before I begin, your Honor——

The Court: Let me inquire. I didn't know whether you intended to offer any further exhibits?

Mr. Dreifus: No, we have no further evidence at all.

The Court: No further evidence.

Mr. Dreifus: The defendants have nothing further?

Mr. Weikert: Nothing further.

(Argument by Mr. Dreifus on behalf of the government.)

(Argument by Mr. Weikert on behalf of defendants.)

(Argument by Mr. Griffin on behalf of the government.)

(Reply by Mr. Weikert on behalf of defendants.)

(Remarks by the Court, ending with:)

The Court: Well, I will review the documents further, and give further thought and study to the matter and will render a decision. I may have time to get at it some time next week. So the matter will stand submitted.

[Endorsed]: Filed October 23, 1958. [121]

PLAINTIFF'S EXHIBIT No. 5

United States Department of Agriculture
AMA Docket No. 14-1

In the Matter of the Petition of
LO BUE BROTHERS, a Co-Partnership,
Petitioner.

Room 1003, 1031 South Broadway,
Los Angeles, California,

Thursday, June 14, 1956

The above-entitled matter came on for hearing,
pursuant to notice, at 2:30 o'clock p.m.

Before: Glen J. Gifford,
Presiding Officer.

Appearances:

JOHN S. GRIFFIN, ESQ.,
Regional Attorney, U. S. Department of
Agriculture,
Appearing on Behalf of the U. S. De-
partment of Agriculture.

GEORGE V. WEIKERT, ESQ.,
918 Oviatt Building,
Los Angeles 14, California,
Appearing for the Petitioner.

PROCEEDINGS

Presiding Officer Gifford: If you are ready to
proceed, gentlemen, the hearing is in order.

Plaintiff's Exhibit No. 5—(Continued)

Do you care to enter your appearances and representations?

Mr. Weikert: G. V. Weikert, 918 Oviatt Building, Los Angeles 14, California, appearing for the Petitioner.

Mr. Griffin: John S. Griffin, Office of the General Counsel, U. S. Department of Agriculture, Los Angeles, California, appearing for the Deputy Administrator, Agricultural Marketing Service, U. S. Department of Agriculture.

Presiding Officer Gifford: My name is Glen J. Gifford. I am a Hearing Examiner from the Office of Hearing Examiners from Washington, D. C., and I have been designated to conduct this hearing.

As you all know, the testimony in this type of case is taken under oath or affirmation. The witnesses will therefore come forward and be sworn or affirmed and give their testimony, which will be followed by the usual cross-examination that is necessary.

The Petitioner, of course, has the burden of proof to sustain the material allegations of their petition. Before the close of the hearing a time will be fixed within which briefs may be filed, and if they are filed they are required to be filed in four copies and to be printed or mimeographed. They may be signed either by the Petitioner or party submitting [3*] the brief or by the representative of the party. When they are thus prepared, they should be mailed

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Plaintiff's Exhibit No. 5—(Continued)

to the Hearing Clerk, Room 112, Administration Building, U. S. Department of Agriculture, Washington 25, D. C. The time for filing briefs will be fixed later in the hearing.

When this record is completed, it is checked and certified by me, and filed in the Office of the Hearing Clerk, where it becomes a public record. However, those records cannot be removed from that office. Therefore, if any of you desire a copy of this transcript for your own files, you will have to order it from the reporter and pay for it as you may agree to do. In other words, the Government does not furnish free copies of this type of record. I think that Mr. Weikert and Mr. Griffin are perfectly familiar with the procedure of this type of hearing.

Are you ready to proceed?

Mr. Weikert: I would like to call Mr. Lo Bue.

Whereupon,

MARIO LO BUE

was called as a witness on behalf of the Petitioner, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Weikert:

Q. Will you please state your full name and address?

A. Mario Lo Bue, Tulare County, California. [4]

Q. What is your business or occupation, Mr.

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of Mario Lo Bue.)

Lo Bue? A. We grow and pack citrus.

Q. When you say "we," do you refer to Lo Bue Brothers?

A. Yes; two brothers and myself.

Q. Is that a partnership? A. Yes.

Q. And who are the partners?

A. Fred Lo Bue, Joe Lo Bue, and myself.

Q. Where is the principal place of business of Lo Bue Brothers?

A. 201 South Sweetbriar, Lindsay, California.

Q. And that is in Tulare County?

A. Yes.

Q. And Tulare County is in the so-called Central California District? A. Right.

Q. And you are the individual who signed the petition on behalf of Lo Bue Brothers in this proceeding? A. I am.

Q. Will you state, please, in general the nature of the business operated by Lo Bue Brothers?

A. We pack citrus for other growers as well as our own citrus we raise. We pack on consignment basis and do not buy citrus or operate in any other form.

Q. But the partnership, Lo Bue Brothers, you do grow citrus [5] of your own?

A. Yes; we have 120 acres of our own in citrus, planted in citrus.

Q. And is all of the citrus handled by Lo Bue Brothers grown in Central California?

A. Yes.

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Mario Lo Bue.)

Q. How long has Lo Bue Brothers been operating in this manner?

A. We started back originally in 1938.

Q. How long have you personally been connected with the citrus business in Central California?

A. Since 1934.

Q. Approximately what percentage of the navel oranges handled by Lo Bue Brothers represents its own fruit and how much or what percentage represents fruit handled on consignment for other growers?

A. Well, between eight and nine per cent, I would say, is our fruit and the balance is for other growers.

Q. What is the normal shipping season for navel oranges grown in Central California?

A. I'd say from March 15th until about the first of April, that is the latest—oh, no, I would say, or I meant to say, from November 10 or thereabouts to about the 15th of March, and not later than April 1st.

Q. Has that been the shipping season during all of the [6] years that you have operated in Tulare County?

A. Yes.

Q. Will you tell us the manner in which the navel orange crop matures and reaches its peak, after which it deteriorates, over what period of time is that?

A. Well, we start picking generally about the 8th or the 10th of November, and I would say that

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Mario Lo Bue.)

it reaches its peak right around Christmas or thereabouts, anyway the middle of December, and then it starts tapering off after January and February on into March.

Q. And what happens with respect to the quality of the fruit; how long does it hold up in marketable condition?

A. Well, the longer it stays on the trees, the worse condition it gets because it begins to get puffy, you know, and it won't hold up on shipments because they are apt to break down.

Q. Now, during the past years when this marketing order that is herein questioned, namely, No. 14, when Order No. 14 has been in operation, how late in the season has the regulation continued on Central California navel oranges?

A. Around the middle of March, we have always been through and all the regulations have been off or through at that time.

Q. That is up until the season that has just finished?

A. Yes; the one that has just finished, which it went clear on into May. [7]

Q. Normally at about what date do the Central California navels come into competition with Southern California navels?

A. Oh, well, that varies a little bit, according to the season.

Q. I mean on the average.

A. Well, it takes three to four weeks.

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Mario Lo Bue.)

Q. Well, about what date?

A. Oh, about the 15th or so of December. A lot of that is called generally on account of maturity.

Q. What I am talking about is when is the bulk of the Southern California navels, what date that comes into the market when shipments become heavy from the South and in active competition with the Central California navels?

A. That also varies according to the season, but it begins to get heavy about the middle of February.

Presiding Officer Gifford: Do you just have two divisions now, the Northern and the Southern Divisions?

Mr. Weikert: That is right.

Mr. Griffin: Your Honor, I believe that there are three, there are the three, including Arizona.

Mr. Weikert: But for our purposes we are only considering the two, the Central California and Southern California.

Presiding Officer Gifford: That is the reason that I asked the question, because I knew that there were formerly three [8] divisions.

Mr. Griffin: Well, that is not quite right either because actually there are three, there is the Edison District which is separate.

Mr. Weikert: But we are only considering the two.

Presiding Officer Gifford: Just so I understand what you are talking about.

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of Mario Lo Bue.)

Mr. Weikert: As far as this proceeding is concerned, we are only dealing with the two districts, namely, the Central and Southern California Districts.

Presiding Officer Gifford: That is what they are known as, the Central and Southern Districts?

Mr. Griffin: That is right.

Presiding Officer Gifford: Pardon the interruption; you may proceed, Mr. Weikert.

Q. (By Mr. Weikert): Approximately how many carloads of navel oranges did your company have left to be shipped at the end of March of this year? A. At the end of March?

Q. Yes; the end of March. A. Well——

Q. The end of March or the first of April.

A. We had roughly around 40-some cars.

Q. And I understood you to say that in other years you [9] would be all through by that time?

A. Yes.

Q. And marketwise, what effect did the delayed shipment of Central California fruit this season have; what was happening to the price of Central California navels in the latter part of March?

A. That is when the Southern boys were going stronger and they were getting preference over Tulare County, getting from four bits to a dollar a carton over Tulare County navels, anyway from 50 cents to a dollar or more. Our fruit was deteriorating and theirs was just in their prime so they

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Mario Lo Bue.)

wouldn't want our fruit as much as they would the South.

Q. And at the rate at which allotments were being given to your company, how long would it have taken to market the 40 cars that you had left to go at the first of April?

A. Well, they changed that at the meetings as they go along.

Q. Well, my question is, at the rate that it was.

A. Well, they had originally set up March 6th as the finishing date and we still had probably 25 or so cars to go at that time.

Q. That is what it was set up at originally?

A. Yes.

Q. I am speaking of the situation as it was as of April 1st.

A. We still had at least 25 cars or more [10] to go.

Q. I understood you to say that you had 40?

A. It was 43 altogether, but that was as of March 1st.

Q. How long would it have taken you to move those under the prorate allotment that you were receiving at that time?

A. I do not have the exact figures.

Q. Just roughly?

A. Well, I think another five or six weeks.

Q. And would the fruit represented by those 40 carloads have remained in marketable condition for that length of time?

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of Mario Lo Bue.)

A. No; they were already showing deterioration when we shipped these navels.

Q. Was the deterioration very strong or marked?

A. Well, there was considerable, the fruit itself was breaking down a lot and there was a lot more that was going into second grade.

Q. What do you consider to have brought about this condition this year, this situation, where the shipping was being extended beyond the historical termination date?

A. It was way beyond——

Q. Yes, I know; but what brought that about?

A. Well, several reasons, perhaps, but I think a lot of it was because they didn't give us the amount of cars that we should have to have shipped earlier and at the prorated meetings they didn't allot enough earlier and they just let it get too far along. And then the South wanted their share and that just [11] left us to keep on going.

Q. Would you say that this action by the Committee was more favorable to the Southern California growers and handlers in your estimation?

A. Definitely so.

Q. Approximately how many weeks beyond the historical termination date for shipments of Central California navels was the regulation extended this year?

A. Well, I believe it was the end of last week, or the end of May. Now, I could be wrong on that. It should have been not later than the first of April.

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of Mario Lo Bue.)

Q. Do you know how much beyond the historical shipping date of Southern California navels the regulation was extended?

A. Not over about two weeks in the South, and we must have had five or six weeks.

Mr. Weikert: You may cross-examine.

Cross-Examination

By Mr. Griffin:

Q. Mr. Lo Bue, when would you say the shipping season for Southern California navels ended in a normal year?

A. I'm not too sure about that.

Q. Would you say it was about the first of May?

A. I'm not too sure.

Q. Well, do they come in about a month later than in Northern California? [12]

A. As a rule, yes.

Q. So their shipping season usually runs about a month later getting through?

A. Well, that's how the boys feel in the office, whether they want to extend it more or not, according to the market.

Q. I am trying to get at the basis for your answer to Mr. Weikert's question where you stated that the shipping season for Southern California navels had been extended about two weeks as compared to four or five weeks up North. I would like to know what you consider the end of the shipping season down South?

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Mario Lo Bue.)

A. I'd say around the end of May.

Q. Around the end of May?

A. Maybe a little sooner.

Q. And this year when did they finish or have they finished?

A. They lifted the prorate about the same week that they lifted it in our county.

Q. Well, do you know if they have finished shipping down here?

A. I wouldn't say.

Q. You don't know that 137 cars went out last week in Southern California? A. No.

Q. Or that there will probably be a hundred cars that [13] will go out this week?

A. No; I don't know; it could be storage.

Q. But actually you do not know when the Southern California navel shipping season is ended down South? A. Not this season.

Q. So on that basis you do not know whether or not the extension was longer or shorter than it was up North?

A. We always have been through not later than April and I know that they go way beyond us because we start a month before.

Q. But you do not know when it ended down here or if it has ended at the present time?

A. Not this season.

Mr. Weikert: Counsel, for the record can we stipulate as to the date when the regulation ended?

Mr. Griffin: Mr. Weikert, we are going to put

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Mario Lo Bue.)

in evidence documents as exhibits that will show the exact date when the shipping ended, the regulation ended, how many cars went forward on each week, and all that information. I think that that will be a more complete way to have it in the record.

Mr. Weikert: But I meant as part of my case if you will stipulate as to the date when the regulation ended.

Mr. Griffin: Well, we can do that, yes. The regulation ended on May 28th this year.

Mr. Weikert: Thank you; that was for both districts. [14]

Mr. Griffin: Pardon me—just a second. I believe I gave you the wrong information. Yes; I guess that was for Central California. And I believe it ended for Southern California on the same date.

Mr. Weikert: All right, then, May 28th for both districts. Thank you.

Q. (By Mr. Griffin): Now, Mr. Lo Bue, I understood you to say that because the crop in Central California was required to be held longer than normal, that there was a price differential that arose between Southern and Northern California navels?

A. Yes.

Q. When did this occur approximately?

A. We noticed it, I think—

Q. Was that after the fruit began to deteriorate up North?

A. It was more so then than before. We always have a little edge even without that, but it did go

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of Mario Lo Bue.)

more so after the fruit showed deterioration and discoloration, it did go fast.

Q. And by that you mean that the prices declined up North, did they?

A. Yes, and many of the better buyers, in fact, backed off.

Q. Do you know that on April 7th the f.o.b. return to producers in Central California was \$1.87 per carton, and on [15] May 19th the return was \$2.59 per carton?

A. Was that on Tulare County—I don't believe I got the question straight.

Mr. Griffin: Will you read it back?

(Question read.)

The Witness: Well, that could be so, the market could have gone up. It still didn't mean the Southern boys didn't get a lot more than we did.

Q. (By Mr. Griffin): Would you say that the condition of navels in Central California on the 19th of May was better or worse than on the 7th of April?

A. I don't have the figures with me.

Q. I am just asking whether or not the navel oranges up there were in better shape on the 19th of May than they were on the 7th of April?

A. No.

Q. They were in worse shape on the 19th of May; is that right? A. Yes.

Q. Do you know that on the 3rd of March that

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Mario Lo Bue.)

the navel oranges in Southern California were bringing a price approximately 25 cents a carton higher than the Central California navels?

A. I thought it was more than that. [16]

Q. You thought it was more than that on the 3rd of March?

A. Third of March—well, maybe not, maybe that was right.

Q. And this spread continued and even widened all during the month of March?

A. Like I say, I don't have those figures so that I can say yes or no.

Q. But that spread was approximately the same and did not change very much even in the months of April and May?

A. Oh, there were lots of sales where it was 50 cents or six bits. I'm going by auction sales, not by private sales.

Q. Do you have any figures that would support the 50-cent or the 75-cent differential?

A. Not with me.

Q. Now you stated that on April 1st you had approximately 40 cars left to market. Do you know whether you were in any different relation with respect to the cars that you had left to market than any other handler up there in Central California—that is in proportion to your total tree crop?

A. I don't have the other boys' figures, I wouldn't know about them.

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of Mario Lo Bue.)

Q. Well, you have a pretty general knowledge of the situation up there, don't you?

A. Well, I can't keep up with all the boys, I am sure.

Q. And you don't know whether your condition was better [17] or worse than the others?

A. I don't think so, no.

Q. But I asked you whether you thought your condition was any better or worse?

A. All I know is, we had a lot of fruit.

Q. Well, so did everybody else up there, didn't they?

A. Some did and some didn't have as much.

Q. Well, let me ask you this question: Do you think that the bad weather that occurred in late November and through the month of December had anything to do with the fact that more navels, more Central California navels were available to market in March and April and May this year than in other years?

A. Will you repeat that again, please?

Q. Well, let's break it down a little bit. Isn't it true that they had rather bad weather conditions up in Central California in late November and through the month of December last year?

A. Yes; we had some bad weather, yes.

Q. Isn't it also true that the crop probably was the latest maturing that you have had for many, many years, if not forever?

A. Yes.

Q. Don't you think that that has something to

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Mario Lo Bue.)

do with the large quantity that was available and had to be marketed through the months of March and April? [18]

A. Not that much; it would have been a little, maybe five or six weeks later.

Q. Do you know how many cars of navel oranges were marketed in Central California before the first of January last year?

A. I wouldn't know offhand, no.

Q. Do you know that there were approximately 2,000 less cars marketed than for the 10-year average prior to the first of January up there?

A. I wouldn't know that either.

Q. Well, just assuming that that is true, when do you think that those 2,000 cars should be marketed, Mr. Lo Bue?

Mr. Weikert: That is objected to as being argumentative and assuming something that is not in evidence. The witness is being questioned about something that he says he doesn't know about.

Presiding Officer Gifford: That is objectionable.

Mr. Griffin: All right.

Q. (By Mr. Griffin): I believe you indicated that this was the first year that the regulation had gone past the first of April?

A. To my knowledge.

Q. You don't know that in 1954, the 1954-1955 season, the regulation didn't terminate until the 23rd of April?

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of Mario Lo Bue.)

A. You mean lifted then, or the last shipments were made? [19]

Q. I just asked if you know that that was when the prorate was lifted?

Mr. Weikert: Are you referring to Central California or Southern California?

Mr. Griffin: Central California.

The Witness: I don't recall that, sir.

Q. (By Mr. Griffin): Mr. Lo Bue, how did your returns this year on your total pack-out compare with other years on Central California navel oranges? A. We had a fair season.

Q. Isn't it true that you had the best season you have had for 10 or 15 years?

A. One of the best.

Q. If not the best?

A. Well, as I say, I'd have to check figures to give you an accurate answer on that. It was a good year, no question about it.

Q. Do you think that the restricted movement of oranges in the months of January, February and March had anything to do with those returns?

A. Could be, but still we wouldn't have had so much of our fruit that went on the ground or into by-products which didn't bring nearly as much.

Q. What I am talking about is the total returns. Do you [20] think you would have had as much in total returns if there had been no restriction on marketing of oranges from Southern California or Central California?

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Mario Lo Bue.)

A. I think I could have, yes.

Q. You think you would have?

A. Uh-huh. It is just a matter of watching the market itself and not going overboard on the thing.

Q. Well, you can watch the market all you want to and if the price doesn't go up above a certain price, you can't sell your oranges at that price, can you?

A. I didn't get that.

Q. I say, you can watch the market as much as you want to, but if the price doesn't go above a certain price, you can't sell your oranges above that price?

A. That is true, nobody can.

Q. That is true regardless of how well you watch the market, is it not?

A. It's the same with the prorate, they try to determine what the best price will be but they don't always hit it right and get the top market.

Q. Isn't it also true historically, isn't it indicated that if you market as many as 1400, 1500 or 1600 cars of Central California navels a week, that it has a tendency to knock the price down?

A. Yes; certain times of the year, yes. [21]

Q. And do you think that without any restriction or regulations that the handlers from Central California or even from Southern California, do you think that they would have restricted their shipments under that amount?

A. I don't know, I couldn't say what the other boys would do. I cannot speak for the other people.

Q. Well, have they done that in the past and, if

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of Mario Lo Bue.)

so, when? A. Well, I think we have.

Q. Well, I am talking about the total.

A. I don't know.

Q. What happened in 1950-1951 and in 1952-1953 when there wasn't any regulation?

A. We still did all right.

Q. You did all right but the prices were substantially lower, were they not?

A. Well, the whole economy changed since that time; everything is higher now than it was then.

Q. Would you say that it was even more so than during the war years, 1945-1946, when you had price ceilings?

Mr. Weikert: Wait just a minute. What is "more so"?

Mr. Griffin: Very well. Were the prices more so than during the war years?

Mr. Weikert: More what?

Mr. Griffin: Higher.

The Witness: I have forgotten what the ceiling was. [22]

Q. (By Mr. Griffin): Yet the returns this year, Mr. Lo Bue, actually are higher than during any period including the war?

A. And so are all of our expenses for growing them likewise.

Q. Well, isn't it true, Mr. Lo Bue, that what you call the normal shipping season varies from year to year and one year it might start early and end late?

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Mario Lo Bue.)

A. Yes; they never start on the same day.

Q. And likewise they never finish on the same day?

A. No.

Q. And that depends upon a lot of factors, there may be different maturity periods and the weather conditions could have a great influence on it?

A. That is right.

Q. And when you used the word "normal," were you talking about this year, last year, or two years ago?

A. An average.

Q. An average?

A. Yes.

Q. And you would say that on the average they are all through by the first of April?

A. Or even sooner.

Q. And when you say that are you talking about your own shipping or are you talking about everybody up there? [23]

A. Well, on the prorate we are all the same; there is no difference.

Q. But a lot of people wait until the prorate is terminated and still keep on shipping, do they not?

A. Yes; if they want to gamble on the market and hold it, hold the fruit and put it in storage.

Q. Would you know of your own knowledge of what the other shippers did about ending their shipping?

A. I cant' know what the other boys do, no.

Q. So you are talking about your own?

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of Mario Lo Bue.)

A. I am talking about the prorate finishing up at those periods of time.

Q. But as far as shipments are concerned, as far as shipments being completed, you are talking about your own shipments?

A. Well, I would say Tulare County. We follow the same as anybody else in Tulare County.

Q. But going back again, do you have knowledge of what the other shippers do about ending their shipping?

A. Well, when they issue us the last prorate.

Q. Well, again, isn't it true that there are many shippers up there who continue to ship after the prorate has been lifted?

A. There is a few, I would say.

Q. And do you know of your own knowledge when their shipping seasons terminate?

A. No. [24]

Q. So you are speaking only of what you know about yourself?

A. When they left the prorate, that is when the general shipments end unless somebody who is gambling on the market wants to hold. Otherwise, we finish generally pretty much the same time.

Q. Mr. Lo Bue, you indicated in an answer to Mr. Weikert that the organization with which you are connected is a partnership composed of yourself and your two brothers, George and Fred?

A. Joe and Fred.

Q. I'm sorry; Joe and Fred?

A. Yes.

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Mario Lo Bue.)

Q. Is Mr. Luther Woodall a partner or have any connection with your organization?

A. He acts as sales manager.

Q. He is your sales manager? A. Yes.

Q. Is he your packinghouse manager?

A. We have another man for that, Mr. Waller. He takes care of the house.

Q. Mr. Woodall is just your sales manager, then; is that right? A. Yes.

Mr. Griffin: I have no other questions. [25]

Redirect Examination

By Mr. Weikert:

Q. Have you ever known Central California navel oranges to be shipped by anybody as late as May 28th before this current year?

A. Not unless they were just holding to gamble on the market.

Q. But as far as the general operations are concerned?

A. General operations, they are all through.

Q. Have you ever known any year in which the general operations extended as late as May 1st before this year? A. Not for Tulare County.

Q. Beg pardon?

A. Not for Tulare County.

Q. Well, that is what I am talking about.

A. No.

Mr. Weikert: That is all.

Plaintiff's Exhibit No. 5—(Continued)

Presiding Officer Gifford: If there is nothing further, you may stand aside.

(Witness excused.)

Mr. Weikert: I would like to call Mr. Woodall.

Whereupon,

WILLIAM LUTHER WOODALL

was called as a witness by and on behalf of the Petitioner, and being first duly sworn, was examined and testified as follows: [26]

Direct Examination

By Mr. Weikert:

Q. Will you give your full name, please?

A. William Luther Woodall.

Q. And where do you live, Mr. Woodall?

A. Lindsay, California, 450 Lafayette.

Q. Are you connected in any way with Lo Bue Brothers? A. Yes.

Q. And in what capacity?

A. Sales manager.

Q. Will you outline briefly your experience in the citrus business?

A. Well, I started working in the citrus business about in 1920, 36 years that I've been growing, shipping, managing deals.

Q. And in what areas have you had experience?

A. Southern California, Central California and Arizona.

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of William Luther Woodall.)

Q. Are you familiar with the various shipping seasons for navel oranges from the different producing areas of California?

A. I would say that I am familiar with them, but as to the exact dates I wouldn't say that I would know every year the exact dates, what time they were closed and so on. But I would say that I am 98 per cent familiar with them.

Q. What would you say is the normal date on which the [27] Central California navel shipping season is completed or ended?

A. Well, that has been changed the last few years. We used to figure that we had to have all Central California oranges shipped by Christmas. Then some seven or eight years ago they started holding Central California navels into March. And then they extended the prorate into March. And I believe that last year they extended it into April. As far as I can recollect that is the only time they extended the prorate into April. But it has just been the last few years in the business that it has been normal to carry a very large percentage of fruit even into March.

Q. As a general rule up to what date does the marketable life of Central California navels extend?

A. To my judgment, it would be April 1st that you would feel free to ship the most of your oranges and carry them satisfactorily.

Q. What happens to Central California navels that are shipped at a later date?

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of William Luther Woodall.)

A. Well, they are far past their maturity and a lot of chance of skin breakdown and decay and being dull looking from age.

Q. What effect does that have on the price they will bring?

A. Well, it limits you to certain markets and certain trades that will buy Central California fruit, where they can [28] move it quick and get it out of the way. Another thing that it does, it compels the manager or our salesmen to be inclined to sell more of our fruit loose and take less money. I mean to sell to closer markets and take less money because you know that you are liable for trouble when you go into the far East with it where the competition is rough. You have so much left, you have a large amount of Central California fruit on the tree, and naturally everyone is trying to sell in close markets, and they keep undercutting and undercutting until you are way below the actual prices that it should bring. You will have this large percentage of your fruit at the auctions because in going east with your strongest fruit that you are pretty sure will carry, which is a small percentage.

Q. Before the season that has just ended, do you know of any season in which navel oranges were shipped from Central California as late as May 28th?

A. The volume would be nil. One man has had a practice of holding a very few oranges to way, way late, the same as they do in Southern Califor-

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of William Luther Woodall.)

nia. You have one shipper in Southern California that ships navel oranges to July 1st or July 4th, and we have one grower up there that has made a practice of doing it, too. He is a good-sized grower.

Q. And who is that? A. Stievers.

Q. Do you have any—I'm sorry, strike that. Do you know [29] of any year before the season just concluded when any quantity of navel oranges have been shipped out of Central California after May 1st?

A. No; nor any quantity of oranges shipped—that's right, after May 1st—and a very small volume after April 1st.

Q. A very small volume?

A. A very small percentage of the crop.

Q. During the season just concluded, were there any handlers in Central California to your knowledge who shipped their Valencias before they finished shipping navels?

A. Yes; so they told me, they started on the Valencias before they finished the navels.

Q. In other words, they had finished shipping the 1956 summer crop before they had shipped their 1955-1956 winter crop? A. That's right.

Mr. Griffin: I might also remark that that might be objected to as hearsay but I don't intend to make the objection. I just want the record to indicate that I am not asleep.

Mr. Weikert: I will stipulate that you are not.

Presiding Officer Gifford: All right. I thought if

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of William Luther Woodall.)

you wanted to raise the question, you would object.

Q. (By Mr. Weikert): During the navel orange season just concluded, how did the percentage of elimination by Lo Bue Brothers compare with its percentage of elimination during previous [30] seasons?

A. Well, we finished shipping, I think it was April 11th this year and our elimination was a little over double, I will say, over my past operations of different houses that I managed, including Lo Bue Brothers, over double over previous years. That is going back through the life of prorate; I wouldn't include the frost years, of course.

Q. Referring to Lo Bue Brothers' elimination alone, how did this year's elimination compare with previous years percentagewise?

A. A little over double or thereabouts. I think we ran a little less than four per cent last year and a little less than nine per cent this year.

Q. To what do you attribute the continuation of regulation on Central California navels this season beyond any date in the past when there has been regulation?

A. Well, this is my opinion. You see, we have a prorate board. And as soon as Southern California is in control—well, strike that. As soon as California reaches the higher percentage of the fruit being shipped—

Q. Do you mean Southern California?

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of William Luther Woodall.)

A. Southern California, yes. Then we are cut down to one representative.

Q. And who do you mean by "we"?

A. The Central California Orange Growers, the growers from Central California. Although there are people on the board [31] representing a mass amount of fruit which is not growers. And I feel that that group representing a percentage of the prorate are inclined to show a little preference in favor of Southern California. And the reason I feel that way—I will just mention the group, the Sunkist organization. And why I feel that they are inclined to favor Southern California, their officials are hired by a board and their salaries are set by this board and this board consists of 18 Southern California men—Sunkist men—against two Central California Sunkist men. Therefore, I feel that it is just normal for a person in that position to give way to the masses of the people whom he's working for.

Q. Well, aside from the Sunkist representation on the Administrative Committee, what representation from Central California was there?

A. Well, there is an independent, we are represented by one man who works for the Western Fruit Growers, named Ernie Larson.

Q. He works for Western Fruit Growers?

A. In Southern California, at Redlands. Who, in turn, owns an interest in two other packing houses in Southern California. Therefore I don't

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of William Luther Woodall.)

feel that we have any thought of our welfare represented on the prorate board.

Q. In other words, if I understand correctly, you feel that independent handlers in Central California such as Lo Bue [32] Brothers that were not represented at all on the Committee at the time this regulation was extended to May 28th?

A. Right.

Q. Bearing in mind that the regulation ended for both Central California and Southern California on May 28th, would you state the approximate number of weeks which that regulation carried over beyond the historical shipping season for Central California navels as compared with Southern California navels?

A. Well, I would say eight weeks on the greatest percentage of our fruit from historical life and historical shipping date on an average.

Q. From where?

A. From Central California.

Q. As compared to how many weeks for Southern California?

A. Two weeks. I think those figures are about that. I am mentioning the lifting of the prorate, not the shipments.

Q. With respect to Lo Bue Brothers only—I am referring to their situation only—at April 1st Mr. Lo Bue has testified that it's his recollection that the company had about 40 cars of navels left to go; is he correct in that?

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of William Luther Woodall.)

A. Well, about—he is wrong in the figures, I think. May 28th—I mean, pardon me, March 26th we had 45,102 boxes that we picked. We released one grower that was 6300 or 6400, which made a total of 77 cars that we had to ship March [33] 28th—no, no, wait, I am wrong, I am looking at the wrong figures. Let me go back. That is March 25th; I was wrong on all of my figures.

Q. Well, you had better start over again.

A. March 25th, we had 49,341 boxes of fruit that we had picked. We released 6500 so it would be 90 cars we had to ship.

Q. As of March 25th? A. March 25th.

Q. And what was the condition of that fruit, generally speaking; how long would it be in marketable condition?

A. In my opinion it didn't look like it was going to be very long because our elimination jumped considerably, kept jumping. On a pool starting February 28th and ending March 12th we eliminated seven per cent of our fruit. On a pool starting March 13th and ending March 24th, we eliminated 10 per cent of our fruit. On our last pool starting March 25th, ending April 9th, we eliminated 19.3 per cent. So that growers had as much as 64 per cent elimination in that pool.

Q. That rising elimination indicates what?

A. Indicated that if you held your fruit, we wouldn't have much fruit that was shipable, if the weather continued we wouldn't have much shipable fruit by the first of June.

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of William Luther Woodall.)

Q. In other words, it shows increasing deterioration?
A. Very much. [34]

Q. Well, what, in your opinion, should be done to correct the situation of which you are complaining?

A. In my opinion as an individual, it is that 100 per cent against prorate.

Q. Well, aside from that, assuming that we have the regulation?

A. Assuming we have the regulation—I'd like to state why I am against prorate—my opinion is that Southern California shouldn't be entitled to over 50 per cent of the representation during the shipping season of navels between the shipping seasons of Southern California and Central California, the representation should be 50 per cent Southern California and 50 per cent Northern, taking out executives that might be influenced by the majority of the people they are working for which don't control the majority of the fruit being grown in the State of California.

Q. And would you like to mention anything further that would take care of it?

A. That is all I think about now.

Q. In other words, that would end what you consider discrimination in favor of the South?

A. Well, we feel that we'd have at least a chance then.

Mr. Weikert: You may cross-examine. [35]

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of William Luther Woodall.)

Cross-Examination

By Mr. Griffin:

Q. Mr. Woodall, when does the heavy shipping from Central California, when does it start and when does it start to taper off?

A. Well, our heavy shipments has always been the Christmas week shipments.

Q. And then does that go on?

A. That is the week that we call Christmas shipping week, that is for arrivals for consumptions for the Christmas sales.

Q. Yes. And then isn't it true that shipments continue heavy through January at least from Central California?

A. No; it never has continued heavy as that week.

Q. Let me ask you this question: Isn't it true that substantially more oranges are shipped from Central California in January and February than there are from Southern California?

A. Well, now, that depends on when that occurred, whether it was 20 years ago or this year or two years ago.

Q. The last two or three years since we have had the new marketing order?

A. The last two or three years, yes, because the market is not so good in there, and the Southern California people don't want to ship.

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of William Luther Woodall.)

Q. During the months of November and December, how many representatives do they have on the Board in Central California that sit on the prorate committee? I am talking about grower representatives? A. We are supposed to have five. [36]

Q. Isn't it true that there have been five that have sat right down through November and December? A. I think so.

Q. And, in fact, through most of the month of January? A. That's right.

Q. And how many do they have from Southern California? A. Five.

Q. Beg pardon?

A. The same amount—no, not grower representation. You mean grower representation?

Q. Yes. A. They only have ten on a board.

Q. There are only ten on the Board?

A. That's right.

Q. Including handlers?

A. Including handlers. Now we don't have five grower members.

Q. You don't have five grower members from Southern California?

A. Sitting on the Board through that period, I don't think so. They are supposed to have some handlers.

Q. I am talking only about grower members. Do you know whether there are four or five or how many that sit from Central California?

A. I know the independents have one, American

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of William Luther Woodall.)

Fruit. And [37] National Food has one, which makes it two. And the M.O.D. has one, that makes it three. The Exchange has one, that's four—yes, we have five grower members.

Q. Five. And how many from Southern California during that period? A. I don't know.

Q. Well, there are four handler members, are there not? A. Yes.

Q. Well, four and five make nine.

A. There would be one grower.

Q. All right. Now that is during the period when most of the Central California fruit is marketed, isn't it?

A. No, sir; not the most this year.

Q. You mean there was a greater percentage marketed after the first of February than there was up to the first of February?

A. I don't have those figures. You know them. Why ask me?

Q. Well, we will put them in evidence. I just wanted to know if you knew.

A. I know this much, Mr. Griffin, it was pretty close to half. I don't think it was much over half and I don't think we even had the half shipped. I know that I didn't have half shipped on February 1st, I can answer that.

Q. Aside from representation that sits on the Board, [38] isn't it true that the Committee meetings are open to anyone who wants to come down and tell the prorate Committee what they want?

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of William Luther Woodall.)

A. Sure, and they just listen to you.

Q. And isn't it also true that you came down during the month of April and told them what you thought?

A. Yes.

Q. In fact, didn't you even tell them that if they didn't do something, you were going to ship your fruit anyway on two different occasions?

A. I said I was going to try to ship them.

Q. Didn't you say in words and substance as follows: That you were going to find a way to do it and you were going to do it regardless of what the Prorate Committee did?

A. Well, I don't have that authority to talk that way, in the first place.

Q. I am not asking whether you had the authority; I am asking you if you did say that?

A. I don't remember the exact words I said.

Q. Was it in substance the words I have repeated here?

A. I don't think it was so strong as you say.

Q. The fact is, Mr. Woodall, it was in the nature of a threat to the Committee, if they didn't do something about it, that you were going to move your oranges, that you were not going to let them drop; you were going to move them?

A. I believe I said that I was going to try to find a way [39] to move them, I am sure.

Q. Well, we will have other witnesses to testify as to that?

A. It was something to that effect.

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of William Luther Woodall.)

Q. And you did come down and make representations that you were going to do something about it?

A. I have oranges of my own.

Q. Yes, but that doesn't answer my question. I say you did come down and make these representations that you were going to do something about it?

A. That I was going to try to do something about it.

Q. Referring to the question of elimination: Do you know what the elimination for Central California as a whole up there was this year?

A. I haven't saw those figures yet.

Q. Do you know whether Lo Bue Brothers' was greater or smaller than the elimination as a whole?

A. I haven't seen the figure, I said I don't know what the elimination was; I only know what we eliminated.

Q. Do you know what percentage of the tree crop of Lo Bue Brothers went into fresh fruit channels? A. This year?

Q. This year.

A. I know it all went in but about nine per cent—either nine minus or plus—around nine per [40] cent.

Q. It was around nine per cent?

A. That's right.

Q. Do you know what the percentage was for Southern California as a whole?

A. I know this about Southern California, that they have never been able to ship the percentage

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of William Luther Woodall.)

that they were set up or allotted to ship because their elimination is always greater due to the unmarketable size and grades and they always run from 20 to 30-some per cent unmarketable fruit grown in Southern California over a period of years.

Q. You don't think that any of this fruit in Southern California that couldn't be marketed became that way because they were forced to market a lot of fruit into June and late May?

A. The prorate to my remembrance never extended Southern California into May—I mean into June.

Q. Isn't it true, Mr. Woodall, that nevertheless there have been large quantities of Southern California navels marketed at that time?

A. I will state this, that the Southern California people had a chance to market that fruit had they wanted to take the market. But they have fruit that would carry late and wanted to take a later market which over a period of time has proven much better.

Q. Isn't it true that some handlers down South who, because of prorate and other reasons, hold their fruit and market [41] it late every year?

A. I know of one shipper that holds fruit every year. But he loans out many thousands of boxes of prorate each week—well, I wouldn't say each week—but he loans out many, many thousands of boxes

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of William Luther Woodall.)

of prorate and holds his. I know there is one shipper that does that.

Q. Is it your testimony that the fact that Southern California navels are required to be marketed as late as the middle of May and sometimes into June has nothing to do with the quantities that have to be eliminated? A. What is that?

Q. I want to know whether or not it is your testimony that the lateness of the marketing season in Southern California has nothing to do with the quantities that are eliminated down here?

A. Well, you know, I have been in Central California for eight years. I have shipped oranges out of Southern California in June myself which carried very well.

Q. Well, as a general proposition, isn't it true, Mr. Woodall, that the longer you hold them, the more you have to throw away and that is true, and that it doesn't matter if it is in Central California or Southern California?

A. That's correct. But I will say another thing, that it is also true that the market is always a lot higher the minute Southern California gets the majority of the shipments. [42]

Q. Always? A. Always.

Q. When do they ordinarily start shipments?

A. There might have been one year. I said the majority of their heavy shipments. In other words, when they get up to shipping about a thousand cars and us shipping about 300, something like that.

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of William Luther Woodall.)

Q. And would you say that Southern California is well into the market and shipping large quantities by the first of March?

A. Well, they didn't ship large quantities as best I can remember, I think that at the first of March I believe it was eight and five. I believe the prorate was eight and five. I will say that by the time that fruit arrived that was shipped the first of March, it hit a much better market than the first of March.

Q. Isn't it true that the very lowest prices for the season during the past year were in the month of April?

A. Not according to my knowledge. I have January 10th to January 26th, \$2.57 to \$2.40 delivered, which was our general average most days.

Mr. Weikert: That is on a carton?

The Witness: Carton, yes. Then we hit a low spot the first of March for a week and then it jumped way up and then again in April it went down a little bit only for a very short time. [43]

Q. And isn't it true that in the month of April is when Southern California is in the market the heaviest?

A. But you have a very nice market starting after April when it goes to \$3.69 and you carry that market, from \$3.69 to \$4.00 until May 26th per carton delivered.

Q. Would you say an average of \$2.00 a carton is evidence of a good market?

A. No; we need \$2.25 f.o.b. per carton.

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of William Luther Woodall.)

Q. You don't know that for the week ending the 14th of April the average f.o.b. price for Southern California navels was \$2.00 a carton?

A. I said that they had a bad week the first of April.

Q. Well, this is the 14th?

A. There was one week in there that dipped down on account of bad arrivals.

Q. You don't know that the very best prices for the entire season after the first of March for both Central California navels and Southern California navels was during the month of May?

A. I would say Southern California definitely you might have had occasional sales. But I think you are getting your information from delivered sales, not from people selling in the state, because you don't know what all the independents and different organizations are getting for theirs.

Q. I am getting my information on f.o.b. figures—— [44]

A. Furnished by the Sunkist people, what they are doing.

Q. Who market the largest percentage of this fruit?

A. But that doesn't indicate, as I explained before, what goes on with a close market or your state markets and places like Oregon and Washington, in there.

Q. Do you mean to tell me, Mr. Woodall, that you independents cannot compete with Sunkist?

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of William Luther Woodall.)

A. I have always been able to or I wouldn't be in business.

Q. And your prices are just about as good?

A. We try to get a little more to the grower.

Mr. Griffin: I have no further questions.

Presiding Officer Gifford: Anything further of this witness?

Mr. Weikert: Just a few.

Redirect Examination

By Mr. Weikert:

Q. How do your operating costs compare with Sunkist's costs, if you know?

A. Well, it is much cheaper, I think.

Mr. Weikert: If you are going to have propaganda, let's have it on both sides.

Presiding Officer Gifford: Let's not have too much propaganda. Go ahead. [45]

Q. (By Mr. Weikert): Is it your testimony, Mr. Woodall, that on the average Central California produces better sizes and grades of navel oranges than Southern California?

A. Yes, much better sizes, greater.

Q. And does that explain the higher elimination from Southern California? A. Yes.

Mr. Weikert: That is all.

Presiding Officer Gifford: If there is nothing further, you may stand aside.

(Witness excused.)

Plaintiff's Exhibit No. 5—(Continued)

Mr. Weikert: That is all we have to offer.

Presiding Officer Gifford: Do you have any witnesses?

Mr. Griffin: Yes, sir, but Mr. Presiding Officer, before that I want to take up a few other matters.

I understand that Counsel for the Petitioner is willing to stipulate to a number of allegations that were made in the Answer pertaining primarily to the issuance of the Order, the hearing that was held and so on. I would like to check them with him and see if he is willing to stipulate as follows:

In the second paragraph it is alleged that:

“Respondent avers, however, that on August 5, 1953, the Secretary of Agriculture issued his decision with respect to a proposed marketing agreement and order regulating the handling of navel oranges grown in Arizona and designated part [46] of California (18 F.R. 4708), and that on September 16, 1953, the Assistant Secretary of Agriculture issued Order No. 14 to become effective on September 22, 1953 (18 F.R. 5638). Said Order No. 14 was thereafter duly amended, effective August 1, 1954 (19 F.R. 2941); and the compilation of said order, as amended, was published in the December 10, 1954, daily issue of the Federal Register (19 F.R. 8129; 7 CFR Part 914).”

Now Respondent asks if you are willing to stipulate to that.

Mr. Weikert: With the understanding that the stipulation is for the purposes of this proceeding only, I will stipulate.

Plaintiff's Exhibit No. 5—(Continued)

Mr. Griffin: That is understood, of course.

It is further alleged: “* * * all such provisions were fully justified on the basis of the records of the hearings duly called and held for the purpose of determining whether said order and the amendment thereto should be issued, and, if so, the provisions which should be contained therein. All procedural steps required by law were taken in issuing such order and amendment.”

May we have the same, or may we have that stipulation with the same understanding?

Mr. Weikert: With the understanding that all the stipulations for the purposes of this hearing only, I will so stipulate.

Presiding Officer Gifford: All of the stipulations you make will be just for the purpose of this proceeding, so you [47] will not have to repeat.

Mr. Griffin: It is further alleged:

“Order No. 14 was issued by the Assistant Secretary of Agriculture effective on and after September 22, 1953, following the receipt of evidence at a public hearing after duly published notice thereof, the issuance of a recommended decision with opportunity to file exceptions thereto, the issuance of a final decision, the execution of a marketing agreement by handlers of not less than 80 per cent of the volume of navel oranges covered by said order, and approval of the order by a referendum of producers, all of which was in compliance with the requirements of said act. Also, the required procedural steps were taken with respect to the

Plaintiff's Exhibit No. 5—(Continued)

issuance by the said Assistant Secretary of Agriculture of the amendment to Order No. 14 effective on and after August 1, 1954. Each of the aforesaid provisions is authorized by the act and was incorporated into the said order, as amended, by the Assistant Secretary of Agriculture on the basis of substantial evidence in the records of the respective promulgation hearings.”

Mr. Weikert: So stipulated.

Mr. Griffin: I believe that completes the stipulations.

I would like to call Mr. Coogan.

Whereupon,

M. T. COOGAN

was called as a witness by and on behalf of the Respondent, and [48] having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Griffin:

Q. Will you please state your full name, occupation and address?

A. M. T. Coogan, manager of the Navel Orange Administrative Committee.

Q. And what is the address of that Committee?

A. 117 West Ninth Street, Room 105.

Q. How long have you been working in that capacity or have occupied that position?

A. Since May 1, 1954.

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of M. T. Coogan.)

Presiding Officer Gifford: You had better put on the record the city in which he lives.

Q. (By Mr. Griffin): Your office is in Los Angeles, Mr. Coogan? A. Yes.

Q. Prior to becoming manager of the Navel Orange Administrative Committee, what position did you occupy?

A. I was representative of the Fruit and Vegetable Branch of the U. S. Department of Agriculture in Los Angeles, California.

Q. And how long did you occupy that position?

A. That was May 1st, 1934.

Q. Mr. Coogan, have you prepared or have you had prepared under your direction and supervision an exhibit indicating the Domestic Fresh Shipments of Central California Navel Oranges?

A. Yes, I have.

Q. Will you describe briefly how this exhibit was prepared and what it contains?

A. This exhibit, this one was prepared by myself from the official records of our office and it shows the fresh fruit domestic shipments for the years 1944-1945 to 1950-1951 under Order No. 66. There are two years, namely, 1951-1952-1953, which, of course, have not been under any marketing agreement and there is no information available. And, for the years 1953-1954 and 1954-1955, as well as 1955-1956, under Order No. 14, there is the information for the period under which we have been presently operating under No. 14. This shows the

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. T. Coogan.)

shipment by weeks for the season as well as the percentage of tree crop moved prior to January 1st and the percentage moved after January 1st for all of the years in question.

Q. And that latter information is on the second page, is it?

A. Yes, sir. In addition, we show the week for each year that the prorate was imposed and the week which started unlimited movement as recommended by the Committee, with the exception of 1944-1945, which was open movement to the whole season, which was unlimited shipments, and the year of 1950-1951 for which we have no available information because the records [50] were destroyed.

Q. Is the opening and closing of prorate indicated by the footnote, or footnotes 1 and 2 that appear on the exhibit?

A. Page 2, yes, sir.

Mr. Weikert: Pardon me, but just at this point I am not sure that I understand about the year 1944. I understood that Mr. Coogan said except the year 1944-1945 that these footnotes refer—I just want to get it clear.

Q. (By Mr. Griffin): Mr. Coogan, can you indicate, or rather, you indicated that there was no prorate in effect during the 1944-1945 period.

A. I meant to say 1945-1946.

Q. Was the information contained on this exhibit taken from the records of the Navel Orange Administrative Committee, Mr. Coogan?

A. Yes, sir.

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of M. T. Coogan.)

Mr. Griffin: Mr. Presiding Officer, we would like to ask at this time that this exhibit be received in evidence and we have four copies available for you.

Presiding Officer Gifford: It will be identified as Exhibit No. 1. Are there any questions before it is admitted in evidence? Hearing none, it will be admitted in evidence.

(Respondent's Exhibit No. 1 was received in evidence.) [51]

Q. Mr. Coogan, have you prepared a similar exhibit showing the shipment of Southern California navel oranges? A. Yes, I have.

Q. Will you describe that briefly?

A. This exhibit is primarily identical to the one for Central California except that there is no explanation by percentages of the per cent prior to January 1 and after because it did not seem to be important.

Q. Isn't it true, as a matter of fact, that there are very few shipments from Southern California prior to the first of January?

A. That's correct, yes.

Q. The symbols and marks that you have discussed with regard to Exhibit No. 1 are the same on this exhibit, are they not?

Mr. Wiekert: Well, obviously they are not.

Mr. Griffin: All right.

Q. (By Mr. Griffin): Mr. Coogan, I note that on Exhibit No. 1, for example, you have a footnote

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. T. Coogan.)

No. 3 at the top of the column relating to 1945-1946 shipments.

A. That is right.

Q. And you have Footnote No. 3 relating to the column entitled 1950-1951?

A. That's right. [52]

Q. Now that No. 3 footnote is not the same on both exhibits.

A. One is not available because during the Southern California navel season for the year 1945-1946 they did have prorate allotments.

Q. Now the mention or designation for the footnotes are indicated on the exhibits themselves, are they not? A. That's correct.

Mr. Griffin: We will ask that this exhibit be received in evidence as the exhibit next in order.

Presiding Officer Gifford: They are both entitled the same?

Mr. Griffin: No. One is for Central California and the other is for Southern California.

Presiding Officer Gifford: The one entitled "Southern California Navel Oranges Domestic Fresh Shipments" will be identified as Exhibit No. 2 and admitted in evidence.

(Respondent's Exhibit No. 2 was received in evidence.)

Q. (By Mr. Griffin): Mr. Coogan, have you prepared or had prepared under your direction and supervision, an exhibit that shows the comparative

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. T. Coogan.)

tree crop fresh movement for Central California and Southern California for approximately a ten-year period? A. Yes, I have. [53]

Q. Will you please indicate where this information came from, and how it is set forth?

A. This information came from the official records of the Committee and the lower part that is for the year 1953-1954, including the present year 1955-1956, covers Order No. 14. The prior years are covered by Order No. 66, but that is not indicated on the exhibit although it is true. And it shows the amount of fresh fruit shipments for both Central and Southern California as well as the tree crop, by years, and appears, the percentage of the fresh fruit shipments as related to the total tree crop by years for both Central and Southern California. Now the footnote indicates shipments to the week ending June 3rd. Now this last year we stopped because we have had shipments since then. We have had nine cars for the week ending June 10th of Central California and 132 cars for the week ending June 10th out of Southern California, and we have had some 200 cars, or we have some 200 cars yet in Southern California to move this week and next.

Q. Why were not the figures available for the years 1951, 1952 and 1953?

A. At that time there was no marketing agreement and no information available.

Q. I see.

Mr. Griffin: Mr. Presiding Officer, we ask that

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. T. Coogan.)

this be marked as the exhibit next in order and that it be received in [54] evidence.

Presiding Officer Gifford: This exhibit, entitled "Comparative Tree Crop and Fresh Fruit Movement, Central and Southern California, 1944-1945 to 1955-1956 Season," will be identified as Exhibit No. 3 and made a part of the record.

(Respondent's Exhibit No. 3 was received in evidence.)

Mr. Weikert: Just a question to clarify the record, if I may. My understanding is that these include shipments into the domestic fresh fruit market.

The Witness: May I add, which includes the United States, Canada and Alaska. That is the way the order reads.

Mr. Griffin: And it includes shipments into those areas when the regulations are in effect.

Mr. Weikert: Thank you.

Q. (By Mr. Griffin): Mr. Coogan, have you prepared an exhibit which indicates the attendance at meetings of the Committee by representatives of both the producers and the handlers from Central California and from Southern California?

A. Yes, I have. I prepared this exhibit myself from the official minutes on file in the office of the Committee and it shows the Central California members, and starting with October 26, 1955, the first meeting of the 1955-1956 season up to the

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of M. T. Coogan.)

present date, showing the attendance which indicates the number [55] of handlers, which are four, practically all the time the Southern California and five from Central California. The number of growers from Southern California attending and the number of grower members from Central California attending is shown by the minutes.

Q. And on page 2 of this exhibit have you indicated who those representatives were?

A. Yes. Their names are all there—Do you wish me to read them for the record?

Q. No, I do not think that that would be necessary. I notice that Mr. H. A. Luallen served only until December 1st and then he no longer served, while the other representatives from Central California, most of them served on down through the month of January. Do you have any explanation for this?

A. My general knowledge is that Mr. Luallen at about that time withdrew or his packing company withdrew from the M.O.D. organization and they disqualified him as acting for their member on the committee, and Mr. Singer, who also had considerable acreage in Central California served in his place.

Q. Do you know whether Mr. Singer has substantially as much acreage in Central California as he does in the southern part of California?

A. It would be hearsay, but I have heard him

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. T. Coogan.)

say several times that he has more in Central California.

Mr. Weikert: Well, it certainly is hearsay. But what I [56] was wondering is why his name does not appear if he is supposed to be a Central California representative.

The Witness: I did not say he was because he has always been considered a Southern California member and he is so listed on the other page.

Q. (By Mr. Griffin): Mr. Coogan, apart from what you have heard, don't the records indicate that Mr. Singer has as much acreage in Central California as he has in the south?

A. I think to get the real accurate answer on that, Mr. Hersey, I think that Mr. Hersey could answer that.

Q. Very well. Do you have anything that you wish to add with regard to this particular exhibit?

A. No, sir.

Mr. Griffin: Mr. Presiding Officer, we ask that the exhibit entitled "Representations from Central and Southern California on the Navel Orange Administrative Committee during 1955-56 Season" be marked as the exhibit next in order.

Presiding Officer Gifford: The document will be identified as Exhibit No. 4 and admitted in evidence.

(Respondent's Exhibit No. 4 was received in evidence.)

Mr. Griffin: Just to straighten the record, there

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. T. Coogan.)

are two pages to Exhibit No. 1 and two pages to Exhibit No. 2. There is only one page for Exhibit 3 and two pages for Exhibit [57] No. 4.

Q. (By Mr. Griffin): Mr. Coogan, have you prepared an exhibit pertaining to the per cent of tree crop marketed in all channels, Lo Bue Brothers, Central and Southern California?

A. Yes, I have this exhibit. This exhibit shows, based on the records of the office, the amount that Lo Bue Brothers and Central and Southern California as a whole has shipped in regulated channels by express, by export, and the total fresh fruit. In addition, it shows for Lo Bue Brothers, Central California and Southern California the amount that each one of the three sent to products or otherwise disposed of, as well as the total tree crop moved by Lo Bue Brothers for 1955-56 navel orange season. It shows the total amount that Central California has moved as well as the Southern California.

Q. And was this information, or was this prepared from information from reports submitted to you by Lo Bue Brothers and other handlers?

A. That is correct, yes.

Mr. Griffin: We will ask that this be marked as an exhibit next in order and received in evidence.

Presiding Officer Gifford: The document will be identified as Exhibit No. 5 and admitted in evidence.

(Respondent's Exhibit No. 5 was received in evidence.) [58]

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. T. Coogan.)

Q. (By Mr. Griffin): Mr. Coogan, based upon the shipping schedule which was in effect and which was adopted by the Navel Orange Administrative Committee, how many cars of navel oranges would Lo Bue Brothers have been able to ship between the date of April 6th and May 6th, 1956, had they remained on the prorate schedule and shipped their oranges subject to prorate?

Mr. Weikert: What were those dates again?

The Witness: I think it is April 22nd, Counsel, they were on the schedule and did ship April and received prorate.

Mr. Griffin: They did?

The Witness: Yes. No, it is from May 22nd—No, I am sorry, I have it wrong again—It is from April 22nd, for the week ending April 22nd to the 29th. They were through shipping but as they remained on the prorate basis and the allotment that the Committee recommended to the Secretary, they would have for that received 5,413 cartons. The following week, covering the period of April 29th to May 6th, had they remained on the basis and still held oranges, they would have received 6,095 cartons. And the following week from May 6th to May 13th they would have received 6,894 cartons. On the following week, May 13th to May 20th, they would have received 8,523 cartons. And, of course, after that period the prorate was lifted and they would have been free to ship whatever they wished.

Q. In cars what does that represent; have you computed [59] that?

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of M. T. Coogan.)

A. It depends upon the number of cartons in a car, but if you use a thousand as a base, about 27 cars.

Q. Now you say that they actually completed their shipment sometime around the 22nd of April. What was the reason that they were able to complete their shipments that early when other shipments in Central California were not able to or I mean other shippers were not able to complete theirs?

A. Well, they simply filed a 15-A petition—excuse me, may I have that sheet? They filed a 15-A petition and during the peak ending April the 8th they shipped in addition to their allotment in excess of 25,416 cartons and the week ending April the 15th in addition to the allotment they received they shipped in excess of 6,848 cartons, or a total shipment in excess of allotments of 32,264. So for that reason they were able to complete their shipments at that time.

Q. Were there any periods in the fall of 1955 when the Navel Orange Administrative Committee recommended and the Secretary of Agriculture established open movement for navel oranges from Central California?

A. There were two weeks which they had actually where the Committee had recommended an allotment but due to the fact of the rain and the maturity they recommended unlimited movement, and for that reason those two weeks were

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. T. Coogan.)

open during which anybody could ship as much oranges as they were able to [60] get out at that time.

Q. Based upon your experience in the orange industry over a period of many years, would you say the Central California shippers were restricted in any way as to the quantity of oranges that they could move prior to the first of January during this past season?

A. No, I would not say so. In fact, if they could have gotten out more, it would have been a great help to the whole industry.

Q. Mr. Coogan, do you attend all of the meetings of the Navel Orange Administrative Committee?

A. Yes, sir.

Q. Were you present at the meetings that were held during the months of March and April?

A. Yes, sir.

Q. Did Mr. Luther Woodall attend any of the meetings during March?

A. Mr. Woodall attended the meeting of March 15th and the meeting of March 29th, according to official minutes.

Q. Do you recall if anything was said by Mr. Woodall at the time that he attended these meetings?

A. On both occasions Mr. Woodall was asked by the Chairman for his comments with respect to the market and how much should be set for each district, as they do in the case of all observers. I

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. T. Coogan.)

believe that on the first occasion Mr. Woodall [61] suggested that Central California received 75 per cent of the allotment and Southern California 25 per cent. He did on that occasion, as well as on the next occasion—and I cannot quote his exact words—that he was going to ship the fruit regardless of what the Committee did. The reason I am so sure of that is that after the meeting of March 15th, I instructed our Central California Office to watch Lo Bue Brothers' shipments on the theory that they were going to file a 15-A.

Mr. Weikert: Just a moment. I move to strike any conversation that Mr. Coogan may have had with his subordinates as hearsay.

Presiding Officer Gifford: I think that that is improper.

Mr. Griffin: Very well. However, your Honor, I think that Mr. Coogan has not testified as to any conversation but has merely testified as to action taken by his office.

Mr. Weikert: It is still hearsay.

Mr. Griffin: It is not hearsay; it is merely action taken.

Presiding Officer Gifford: As to how he bases his memory as to what was said, I realize that that part you can leave in, but the future developments as to what was said or done at that time will not be permitted.

Q. (By Mr. Griffin): Did you, Mr. Coogan, instruct members of your staff to make a careful

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. T. Coogan.)

check of Lo Bue Brothers in Central California after Mr. Woodall appeared at this meeting? [62]

Mr. Weikert: Well, now, that is the same thing. Instructions have to be given either orally or in writing. If they are in writing, the writing is the best evidence, and if they are given orally it is hearsay.

Mr. Griffin: I am not asking him for these instructions; I am merely asking him if he gave them.

Mr. Weikert: Well, that calls for a conclusion as to what he said.

Presiding Officer Gifford: No, that is a fact as to what he did, and you can develop it if you want to. Objection overruled.

The Witness: I instructed the Central California Division through Mr. Hersey to check carefully the shipments of Lo Bue Brothers, both after the March 15th meeting and after the March 29th meeting. However, at the March 29th meeting, after the meeting was over I talked to Mr. Woodall and told him—or rather, that is, he told me first—he told me that he had a plan whereby he was going to ship all of his oranges. And I told him that it was my job to catch them if I could. In other words, it was my job as manager of the Committee that if he shipped in excess of the amounts of the allotments, I was to catch him, or it was my job to catch him through our investigating division. And he said, "Of course, I am not going to tell when I am going to do this."

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of M. T. Coogan.)

And I said, "I thoroughly understand that." And then we [63] both laughed about it and that was the end of the conversation.

Mr. Griffin: I have no other questions.

Presiding Officer Gifford: Do you have any inquiry?

Mr. Weikert: Yes, sir.

Cross-Examination

By Mr. Weikert:

Q. It is a fact, is it not, Mr. Coogan, that the percentage of tree crop marketed by Lo Bue Brothers as shown on Exhibit 5 as compared with the percentage of the total tree crop marketed reflects the over-shipments by Lo Bue Brothers?

A. Yes, sir, it does.

Q. Do you recall at any meeting of the Administrative Committee statements by representatives from Southern California that they, on behalf of the South, were going to see that Central California eliminated as much fruit as the South or approximately as much percentage-wise?

A. No, I think the general answer to that question could be that the statements made—and this is at no particular time—but the statements were made that the South should be able to ship their percentage as compared to Central California shipments.

Q. Nothing was ever said in your hearing by

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. T. Coogan.)

any committee member to the effect that Central California should eliminate percentagewise as much as Southern California?

A. There may have been statements made at the meeting but [64] I do not particularly remember.

Q. That is what I mean, do you recall any such statements made at the meetings?

A. I am fairly sure that it could have been said.

Q. Isn't it a fact that under this regulation and even during the present season that Southern California handlers can get all of the prorate allotments that they need to ship early maturity navels before January 1st or February 1st?

A. You mean if they applied for it?

Q. Yes. A. Anyone that applied got it.

Q. Anyone that did apply, they received it; is that right?

A. Yes, everyone that applied for it got it.

Q. And that would be up to as late as February 1st?

A. I do not remember this year, but I can get the record for you if you wish.

Mr. Weikert: I think that is all.

Mr. Griffin: I have no further questions.

Presiding Officer Gifford: If there is nothing further, you may be excused.

(Witness excused.)

Mr. Griffin: I will call Mr. Tyrrell.

Plaintiff's Exhibit No. 5—(Continued)

Whereupon,

RALPH R. TYRRELL

was called as a witness by and on behalf of the Respondent, and, [65] having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Griffin:

Q. Will you please state your full name?

A. Ralph R. Tyrrell, T-y-r-r-e-l-l, Route 4, Porterville, California.

Q. And what is your business or occupation?

A. I am an orange grower in Tulare County.

Q. And that is what has been referred to here today as Central California? A. Yes, sir.

Q. Are you a member of the Navel Orange Administrative Committee? A. Yes, I am.

Q. And did you serve as a member during the 1955-56 season? A. Yes.

Q. I believe the exhibit that was put into evidence shows that you did serve on that Committee as an active member to the month of January; is that correct? A. That's correct.

Presiding Officer Gifford: I think you had better put in some years along here.

Mr. Griffin: That is right. [66]

Q. (By Mr. Griffin): During the 1955-56 season commencing in the fall of 1955 and ending in 1956; is that right? A. That's right.

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Ralph R. Tyrrell.)

Q. Mr. Tyrrell, are you member of the Board of Directors of Sunkist, Incorporated?

A. Yes, I am.

Q. And I assume that you market your fruit through the Sunkist organization? A. Yes.

Q. During the past season, Mr. Tyrrell, when you have served on the Committee, was there any group or organization in Central California that attempted to formulate policy for the Central California growers and shippers as far as recommendations to the Navel Orange Administrative Committee was concerned? A. There was.

Q. And what was that?

A. It was the Little Industry Committee.

Q. And who were members of this Committee?

A. A committee comprised of six handlers and the members of the Prorate Committee from Central California.

Q. Did that cover all segments of the industry, the independents and the other cooperatives that are shipping?

A. Yes, it did. It included two members from the Sunkist Growers, the Stark Packing Corporation, M.O.D., which is the [67] Mutual Orange Distributors, the National Foods, and all other independents. By that I mean that one man represented the other independents.

Q. And was it the custom of this Committee to hold a meeting in Central California each week?

A. It was.

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of Ralph R. Tyrrell.)

Q. And what was the purpose of those meetings?

A. The handlers got together and discussed the amount of fruit that they thought should be shipped from Central California and instructed the members of the Prorate Committee on their findings.

Q. So that when members of the Navel Orange Administrative Committee came down South from Central California, they did so with a recommendation from this Little Industry Committee?

A. That is correct.

Q. Now you served as a member on that Little Industry Committee, did you? A. Yes.

Q. What was the policy adopted by this Little Industry Committee in Central California with regard to the marketing of Central California Navel Oranges during this past season?

A. The Little Industry Committee recommended to the Prorate members that they prorate the fruit for a price and not as to volume. In other words, obtain a fair return to the grower for the amount of fruit shipped, rather than market all the fruit. [68]

Q. And would you say that it was primarily their purpose to get money for the crop rather than to market the entire crop?

A. That is the purpose.

Q. On occasion did the Little Industry Committee recommend lighter shipments for Central California than some of the other members of the

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Ralph R. Tyrrell.)

Navel Orange Administrative Committee thought should be made? A. They did.

Q. And to the best of your recollection what was the action that was taken by the Navel Orange Administrative Committee?

A. In most cases they took the recommendation of the Little Industry Committee or the representatives from Central California.

Q. Now you were present, were you, when Mr. Woodall testified here today? A. Yes.

Q. And you heard his testimony that there was a tendency on the part of the Navel Orange Administrative Committee to favor heavier shipments from Southern California just as soon as the large volume of the Southern California navel oranges came into the market?

A. I heard the testimony, yes. [69]

Q. And would you say, based upon your experience with that committee, that that was a true statement? A. No.

Q. And as a member of that Committee do you feel that the Navel Orange Administrative Committee gave every consideration to the policies that were adopted and made known to them by the Central California Navel Orange Growers and Shippers? A. I do.

Q. Do you know, Mr. Tyrrell, of anyone in Central California who was opposed to the policy as offered and followed by the Little Industry Committee?

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of Ralph R. Tyrrell.)

A. No one talked to me to the contrary.

Q. And so far as you know it was a unanimous decision to follow the policy of getting money for the crop rather than shipping all of the crop?

A. As far as I know.

Q. And that was true with regard to representatives from M.O.D. and from the independents and the American Foods, and all the rest of them?

A. That is true.

Q. Do you recall also, Mr. Tyrrell, whether or not representatives from Central California at meetings of the Navel Orange Administrative Committee didn't tell the Committee that they would much prefer to ship a smaller quantity of oranges and get a good price than to ship all of the oranges and not get a reasonable return? A. Yes.

Q. And isn't it true that that was discussed around the table many times? A. Yes.

Q. Was there anything unusual about conditions in Central California this past fall as far as shipments of oranges was concerned, Mr. Tyrrell, was there any bad weather, for example?

A. You mean the beginning of the season?

Q. The beginning of the season, yes.

A. Yes, the weather we had interfered with the maturity and we were not able to get out the volume. In other words, the rain interfered and we were not able to get out as much as the Prorate Committee wished that we could.

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Ralph R. Tyrrell.)

Q. And was there any difficulty with maturity this year?

A. Yes, early in the season there was a great deal of trouble.

Q. Do you recall some of the reasons why, perhaps, you had more trouble with maturity this year than you have had in other years?

A. That is hard to determine, what caused the late maturity.

Q. Well, isn't it true that you were confronted with a [71] new State Maturity Law?

A. Yes, we were, with the color standards.

Q. And this was the first year that that was in operation; is that correct?

A. That is correct.

Q. And isn't it also true that there was some uncertainty among certain producers and handlers as to what it would be or as to how it would be applied?

A. Correct.

Q. So there was more caution, perhaps, than there was in other years?

A. There could have been.

Q. What, in your opinion, Mr. Tyrrell, is the normal shipping period for Central California navel oranges?

A. The normal time would be to start around November 8th or November 10th—it has been earlier and it has been later—but the normal time is about then and the closing period should be April

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Ralph R. Tyrrell.)

15th or not later than April 15th, in my opinion.

Q. Has there been any change in conditions either with regard to the volume of the crop or marketing conditions which might change the normal shipping season in recent years as compared to six or ten years ago? A. There was.

Q. What are some of those conditions?

A. The biggest determining factor in restricting our [72] shipments to maintain a satisfactory price during our marketing season is the competition from other areas.

Q. Do you recall, Mr. Tyrrell, that six to ten years ago you used to ship as high as 1600 to 1800 cars a week? A. I do.

Q. And has that been done in recent years?

A. No.

Q. Last year did the Committee experiment with shipping some rather large volumes in certain weeks?

A. Yes, in December there were large volumes, something like 1400 or 1500 cars per week.

Q. And what happened as a result of those heavy shipments?

A. It had a very, very depressed market that took eight weeks of restricted shipments to correct the market.

Q. And what would you say now is the approximate maximum as far as volume is concerned that can be shipped each week—and when I say “shipped,” I am talking about navel oranges—

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Ralph R. Tyrrell.)

without disturbing or causing a depressed market?

A. Well, I would think that during December 1200 cars would be it as the experience in the last two years would show.

Q. The exhibit Mr. Coogan put into evidence indicates that this year only 16.87 of the tree crop was marketed prior to the first of January, and that compares with other years as high as 81 per cent and 75 per cent or 72 per cent. Now, what, in [73] your opinion, was the principal cause of pushing the navel oranges from Central California into the late part of the month of April and May of this year?

A. That was because we lost during November and December 1500 to 2,000 cars which we normally would have shipped. I believe the figures are 2600 cars were shipped when we should have shipped 4,000 or better.

Q. And that left more than half of the fruit to go after the first of the year?

A. That is right.

Q. In fact, it left 73 per cent, did it not?

A. Yes, and you cannot ship it all in one week; it has to be strung out over a longer period of time.

Q. Now when you lose 1500 or 2,000 cars of oranges before the first of January, is there any way that you can recapture that or is that gone forever? A. That is gone forever.

Q. And what would have happened, in your opinion, if the some 2,000 cars that should have

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Ralph R. Tyrrell.)

been marketed before the first had been dumped onto the market during the months of January, February and March?

Mr. Weikert: That is objected to as being speculative.

Presiding Officer Gifford: If he knows.

Q. (By Mr. Griffin): Mr. Tyrrell, might I ask how long have you been an [74] orange grower?

A. For 30 years.

Q. And as a director of Sunkist, are you familiar with the markets and the prices obtained by producers for oranges? A. I am.

Mr. Griffin: I think that he is qualified.

Presiding Officer Gifford: Go ahead and answer the question.

Mr. Weikert: But nobody could possibly know what would have happened if something took place that did not actually take place.

Presiding Officer Gifford: I think your point might be well taken. But the general result historically may be determined, he may be able to determine that. I do not know if his experience would qualify him, but if he can answer, if he is qualified, he may answer.

Mr. Griffin: It ties in to the prior testimony about not being able to market a certain number of cars every week.

Presiding Officer Gifford: If it is already in the record, why put it in? Objection is overruled at this time.

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Ralph R. Tyrrell.)

A. The Prorate Committee set up allotments for both areas of 1350 cars and then for 1300 for two or three weeks consecutively. Then the market dropped perceptively and they reduced it to a thousand cars in order to correct the market. That would answer the question that Mr. Griffin asked. [75]

Q. (By Mr. Griffin): Mr. Tyrrell, as a producer, what was the total over-all return that you received this year from your navel crop as compared to other years; was it higher or lower or about the same?

A. On the crop price for oranges in Tulare County it is one of the highest on record with the exception of one more year and it equalled that.

Q. In other words, it equals any year in history and is tied only by a year during the war; is that correct?

A. Right.

Q. As a producer of oranges, Mr. Tyrrell, do you think that it would be fair or equitable at all to require all of the other producers and handler of oranges to comply with the regulations or restrictions imposed under the marketing order and permit this petitioner to be exempt from those restrictions?

A. They must comply.

Q. Would it be fair to exempt them and let them ship all of the oranges that they wanted to and yet restrict the other producers?

A. No.

Q. I wonder if you can tell us just a little bit

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Ralph R. Tyrrell.)

about why that would not be fair, why it wouldn't be fair to let them ship all they wanted to.

A. Well, if one does it, the others should be entitled to [76] because otherwise then you have no prorate.

Q. Who makes the market in a situation like that? A. The growers and the shippers.

Q. And would you say that the restrictive shipments tend to make the market—I think as a matter of fact you have so testified?

A. Absolutely.

Mr. Griffin: I have no other questions.

Presiding Officer Gifford: We will take a short recess at this time.

(Recess.)

Presiding Officer Gifford: On the record. I believe that Mr. Tyrrell was ready for cross-examination.

Cross-Examination

By Mr. Weikert:

Q. How many acres of navel oranges do you grow, Mr. Tyrrell? A. Twenty.

Q. Are they all in Tulare County?

A. Yes.

Q. Have you ever been connected actively with any citrus selling corporation?

A. What do you mean by "selling," do you mean selling oranges?

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of Ralph R. Tyrrell.)

Q. Yes. [77]

A. I have been on the Board of Directors on our packinghouse and I am now on the Board of Directors of the Sunkist Growers, Incorporated.

Q. Have you ever had any sales experience yourself? A. No.

Q. Who were the members of this so-called Little Independent Industry Committee to whom you referred as representing all other independents? A. Theodore Roberts.

Q. And with what organization is he connected?

A. Independent Growers.

Q. What is Independent Growers?

A. That is the name of the packinghouse in Lindsay.

Q. Over what period of time were the meetings of this Little Industry Committee held?

A. We started, well, they started at the beginning of our season last November and ran through November, December and January.

Q. How many meetings were held altogether?

A. I do not have the record for sure but we met every Tuesday at 9:30 or 10:00 o'clock.

Q. And who was notified of these meetings?

A. All the members of the committee.

Q. Was Lo Bue Brothers notified of these meetings? A. That I can't answer. [78]

Q. Was Lo Bue Brothers represented on the committee?

A. I understood by Theodore Roberts.

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of Ralph R. Tyrrell.)

Q. Was Theodore Roberts connected in any way with Lo Bue Brothers as far as you know?

A. As I understand it, he represented other independents.

Q. Do you know who appointed him to represent the other independents? A. I do not.

Q. Do you know how he was selected for this committee? A. I do not.

Q. Do you know of your own knowledge whether anyone connected with Lo Bue Brothers knew of the existence of this committee? A. No.

Q. Are you, as a grower, have you had your final returns yet for your navel crop of 1955-56?

A. All but the last pool, which consists of approximately 25 per cent of the crop.

Q. So you don't know yet exactly how much you will receive for your crop, is that correct?

A. Very close, yes.

Q. But you do not know what the final returns are going to be?

A. I could tell you what it is going to be within a few cents. [79]

Q. In other words, 25 per cent of your crop has still not been reported, yet you know what the total returns are going to be?

A. I believe they have been sold because I talked to the packing house manager, yes. I know it's been sold.

Q. When you testified that your returns this year compared favorably with your returns for any

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of Ralph R. Tyrrell.)

other year in the past, you were referring to the price received per box or per carton rather than the total return, were you not?

A. I said tree crop, which means total returns for the tree crop, total returns on the tree crop.

Q. Can you tell us what your return for the tree crop was this year?

A. My individual return?

Q. Your own individual return, because I understood you were testifying only about your own.

Mr. Griffin: Mr. Presiding Officer, I do not think that that is either pertinent or relevant as to how much return he received. The relative level of the return is what matters and unless Mr. Tyrrell particularly wants to or has no objection to giving the information, I don't think that that is relevant.

Presiding Officer Gifford: If he has objection to giving it, he will not be required to do so. But he has stated that he has only had the returns from three-fourths of his crop and one-fourth is yet to be determined. I think that it is a proper [80] inquiry to find out how he bases the total estimate if that is the point you are getting to.

Mr. Weikert: Yes; it seems to me that where a witness testifies that he has received as much this year or more for his crop than he has ever received before, I think it is proper to cross-examine as to the basis for that statement.

The Witness: That isn't the statement I made. The statement I made was that Central California

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of Ralph R. Tyrrell.)

as an area, as a whole, has received more money than any other previous year except one, and it equalled that.

Mr. Weikert: Then either the witness or I misunderstood the question. My recollection of the question was, how did your returns compare with your previous returns?

Presiding Officer Gifford: Yes; that is a different question. But he has clarified it and explains that what he meant by his testimony and you can pursue it on that basis.

The Witness: I can give you figures for the entire area if you would like to have it.

Q. (By Mr. Weikert): Do you know the tree crop return for every grower in Tulare County?

A. No.

Q. Well, then, when you say, "entire," are you referring only to those growers whose fruit is marketed through your Sunkist organization? [81]

A. I referred to Tulare County, to Central California.

Q. Do you know how much the returns were of every grower in Central California? A. No.

Q. And how can you make the broad statement with respect to the returns for Central California this year as compared to other years; what are you basing it on?

A. The information is on the record of how many dollars have been received in Tulare County

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Ralph R. Tyrrell.)

based on the average of Sunkist Growers, Incorporated, the price they received.

Q. Then your testimony is related only to the Sunkist organization and not to any other grower, is that correct? A. That could be correct.

Q. I beg your pardon?

A. It could be correct.

Q. Well, it is not whether it could be; is it?

A. Yes.

Q. And does your testimony relative to the returns of growers marketing through Sunkist Growers, Incorporated, relate to packed fruit only or does it relate to fruit sold in other channels?

A. You mean the basis on which the return was based?

Q. I am referring to your testimony. When you say that you were testifying to the on-tree returns of Sunkist Growers in Central California, are you referring only to the on-tree [82] returns of packed fruit or the total?

A. The figures are based on packed cartons f.o.b.

Mr. Weikert: That is all.

Redirect Examination

By Mr. Griffin:

Q. You have lived in Central California for 30 years or more, have you? A. Yes.

Q. And are you pretty well acquainted and do you have a wide acquaintance among producers and

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Ralph R. Tyrrell.)

packers of oranges? A. I have.

Q. And would you say that it was pretty general knowledge last fall that this Little Industry Committee was operating? A. Yes.

Mr. Weikert: Just a moment. I certainly object to that as calling for a conclusion. It does not make any difference how general the knowledge was, if everybody didn't know.

Mr. Griffin: Very well. I will rephrase it.

Presiding Officer Gifford: I think you might do that.

Q. (By Mr. Griffin): Mr. Tyrrell, was the action of this Committee a topic of conversation among packers and producers last fall?

Mr. Weikert: I will object to that as calling for a conclusion and no foundation having been laid. This is a 20-acre producer and how is he going to know what everybody is talking about? [83]

Presiding Officer Gifford: He can describe what publicity was given by this Committee. That is the inquiry that he is trying to make.

Mr. Weikert: Well, that is all right.

Mr. Griffin: I think, your Honor, that it is proper to ask this witness whether or not based on his acquaintance it was a topic of conversation among packers and growers as to the operation and function of this committee. That fact is a fact that exists and it is not a conclusion at all. He had these conversations and he is widely known in the area and he can testify as to it.

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Ralph R. Tyrrell.)

Presiding Officer Gifford: Unfortunately I do not agree with you. I think that if there was any publicity that the petitioner might have known about or if there is anything to show that he reasonably could have received notice of the committee, then I think it would be perfectly permissible.

Mr. Griffin: Very well, your Honor.

Q. (By Mr. Griffin): Mr. Tyrrell, do you know whether there was anything published in any of the papers up there with reference to the action of the committee? A. No.

Q. You don't know whether there was or not?

A. No; I do not know.

Q. Mr. Tyrrell, was the meeting of this committee open to [84] anyone other than the members?

A. Yes.

Q. Was it well attended by others, by packers and handlers other than those that were members of the Committee?

A. No; other than the Committee, no.

Q. But there was no restriction against their attending? A. I know of none.

Mr. Griffin: No other questions.

Mr. Weikert: No further questions.

Presiding Officer Gifford: If there is nothing further, you may stand aside.

(Witness excused.)

Mr. Griffin: I would like to call Mr. Seares.

Plaintiff's Exhibit No. 5—(Continued)

Whereupon,

H. L. SEARES

was called as a witness by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Griffin:

Q. Will you please state your full name, Mr. Seares? A. H. L. Seares.

Q. And what is your address?

A. 117 West Ninth Street, Los Angeles.

Q. And what is your business or occupation, Mr. Seares? [85]

A. I am Field Manager for the Navel and Valencia Orange Committee.

Q. And how long have you occupied this position, Mr. Seares?

A. I have been with the Committee—with the Committee or as Field Manager?

Q. Field Manager for the Committee.

A. Fifteen years.

Q. And when you say 15 years, you refer to the work with the present Committees and with your work with the Committee organized under Order No. 66 as well as the new Order No. 14?

A. That is right.

Q. And prior to the time that you had this position as Field Manager, Mr. Seares, what was your occupation?

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of H. L. Seares.)

A. I was Assistant Field Manager for about the same period. I started with the Committee in January, 1934, and then about 15 years ago I was made Field Manager.

Q. Are you familiar, generally, Mr. Seares, with the production of oranges in Central California and Southern California? A. Yes.

Q. Briefly stated, what is the function of the Field Department of the Committee?

A. Well, our principal function is to set over all crop estimates for both varieties in the different pro rata districts [86] and later to adjust or try to adjust shipment estimates in conformity with the over-all estimate to measure fruit and give the committee an idea of the size and percentage of each size that they expect during the season. Also at intervals during the season—every 30 days, to be exact—to measure, to keep track of the rate throughout the season.

Q. Are any opinions expressed to the committee as to how long a crop might keep or whether or not there will be substantial loss during any particular period?

A. Oh, on occasions, yes, when we have had field conditions such that would affect the crop output, that is always reported to the Committee.

Q. And those reports are based upon personal examination of oranges in the field by you and your staff? A. That's correct.

Q. Based upon your experience, Mr. Seares,

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of H. L. Seares.)

would you say that there is any substantial difference in the keeping qualities of navel oranges produced in Central California and navel oranges produced in Southern California—I am referring to a general proposition?

A. Oh, the average, well, taking it for either period, taking the time from which the oranges first begin to test, normally Central California oranges test four to five weeks before Southern California. So you always have that difference between conditions of the fruit throughout the season. [87]

Q. Apart from the fact that they mature at different times, they will keep and can be marketed during approximately the same period?

A. That is my opinion.

Mr. Griffin: I have no further questions.

Mr. Weikert: No questions.

Presiding Officer Gifford: If there is nothing further, you may step aside.

(Witness excused.)

Mr. Griffin: I will call Mr. Street.

Plaintiff's Exhibit No. 5—(Continued)

Whereupon,

M. D. STREET

was called as a witness by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Griffin:

Q. Will you please state your full name?

A. M. D. Street.

Q. And do you live in Los Angeles?

A. Yes.

Q. What is your business or occupation, Mr. Street?

A. I am Assistant Treasurer of Sunkist and head of the Market Research Department.

Q. Mr. Street, have you prepared or have you had prepared [88] under your direction an exhibit that shows in graph form the quantity of navel oranges marketed from Central California during past seasons?

A. Yes; I have.

Q. Would you please tell us where this information came from and what the exhibit purports to show?

A. These two charts, which we are entering as exhibits?

Q. Well, we are talking about Central California only now.

A. This exhibit is only a picture of the data shown in an earlier exhibit, No. 1, entered by Mr.

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

Coogan. Sometimes it is easier to tell from a picture what happens than it is from the individual figures. If you'd like me to discuss this a bit, I can.

Q. I was going to ask you if there was any comment that you wish to make regarding the change in the pattern which appears on this exhibit, particularly with regard to 1955-56 and the last few years as compared to the pattern which is shown for the five-year average?

A. In discussing this exhibit I would also like to use some actual figures from Exhibit No. 1, because they are the same thing, one being a picture and the other is the actual figures. I'd like to call attention to the three lines on this chart. First, the line made up of dashes and dots, which is the average of the data shown in Exhibit 1 for the five-year period, namely, [89] 1946-1947 to 1950-1951. It is clearly seen from this chart what has earlier been stated by other witnesses, that during this period that it was normal for Central California—if we can use the word “normal”—to finish substantially their shipments about the first part of February. That was not only typical of this five-year period but any other period you want to take all the way back through the 1920's or 1930's or 1940's. So certainly I would say it has been normal over a long period of time for Central California to conclude their shipments early in February.

And that was true for a perfectly good reason.

Q. I might interrupt you, Mr. Street, before

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

you go into an explanation of that. I might ask you, how long have you been associated with Sunkist?

A. Since early 1939.

Q. And what is the nature of your work and what is your education background as far as it deals with agriculture or economics?

A. I graduated in mathematics, Mr. Griffin, and completed all of my work for my Doctor's Degree at the University of California in Agricultural Economics.

Q. Have you been head of the Research Department at Sunkist during the entire time of your employment there?

A. Since about 1940.

Q. Very well, now, will you please discuss the pattern [90] which is shown for the three-year average and for 1956 and tell us, if you can, what explanation there is for the differences in these patterns?

A. Before going to the line made up of dashes, also shown on this chart for 1953-1954, there is a 1955-1956 or the solid line depicted for 1955-1956. And I would like to describe a little bit why it was normal for Central California to finish their shipments early in February.

During these early years, up until about 1948 or 1949, as a matter of fact, the average weekly shipments which it was possible to make of California-Arizona navels and for which a good return could be obtained, was approximately 1,800 to 2,000 cars. So that the simple arithmetic of the thing, there

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

were tree crops in Central California, ranging anywhere from 10,000 to as high as 15,000 cars, they could complete their marketing by early February and receive a good return. It is just as simple as that. Just arithmetic.

That does not mean in my opinion that it was necessary to conclude the marketing of the crop because the fruit wouldn't keep any longer. It simply meant that you had so many cars that you had to ship. And if you had, for example, 12,000 cars, you could ship in six or seven weeks and you could conclude your shipments.

Now, to go back——

Q. Pardon me, but might I ask at this point, Mr. Street, [91] if it wasn't also a practice in Central California to try and get the fruit off as early as possible in the year because of possible freezes?

A. Well, that has always been true and still is the desire to do that, because after the first of the year there is always an extreme frost hazard as far as the growers are concerned and they like to have all of the crop marketed before frost if they can.

Q. And to the extent that the market will take the fruit, there is an incentive for them to do it at that time rather than hold it and try to market it?

A. That is true, and it was true then and it is true now.

There has been some discussion about normal and what was normal in 1930's and 1940's is quite a different thing than what is normal today, and dur-

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

ing the 1950's. I would say that during the 1950's a lot of things have happened to change this normalcy. I think that that is what we are here about.

I would like to call your attention specifically now to the dotted line illustrating the data given on Exhibit No. 1 for the latest three-year period, namely, 1953-1954 to 1955-1956. It is quite clear that the season, instead of finishing early in February as happened for so many years, now that in this period that the shipments go all the way through March and even into April with very small shipments even extending into May, but not very [92] much.

Now, there are perfectly good reasons for that situation, and in my opinion that is a normalcy at the present time and is likely to be the normal situation for the next foreseeable period.

That has been brought about by, well, primarily not by a change in the keeping quality of the fruit on the trees, but by a change in the market as to how much can be shipped each week and at a price that will return any money back to the grower. What has happened then between this early period when the normal situation was to finish in the first or second week in February, finish marketing the major portion of their crop, and now where a normal situation can be considered to finish in April or maybe even in May, has been brought about primarily by the fact that the market for California-Arizona navel oranges is no longer 1,800 to 2,000

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

cars a week. If that were true, then we wouldn't in all probability be here discussing this problem. What has happened is that there has been a development of a new product beginning some time in about 1948. Now this new product everyone is familiar with is orange, frozen orange concentrate.

Further, Florida has increased its production of oranges in the last 15 years from about 50,000 carloads to 250,000 carloads. These oranges are all harvested and marketed during the navel orange season. Now that is the big change. There is this great amount of cheap oranges—and they are [93] cheap—and, as I say, they are all harvested and marketed during the navel orange season. That is the big change that has taken place.

Now each week during this period depicted here on this graph there is being marketed in the U. S. and Canada and Alaska, the equivalent of about 3,500 carloads of oranges in cans, the major portion is frozen orange concentrate and other natural strength orange juice. In addition to 3,500 cars each week there is being marketed from Florida in fresh oranges about 1,500 carloads a week on the average. I mention average because during the Christmas market Florida gets up to as high as 3,000 or 4,000 cars a week. So that as a result of this tremendous competition of some 5,000 carloads a week each and every week during this season, it is no longer possible to ship 2,000 carloads of California-Arizona navels and get any returns back for them at all.

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

As a matter of fact, it is my opinion based on my service on the Orange Committees and my job as head of market research at Sunkist, that if any such attempt were made that you would not even get back your freight returns. So there is a real problem in economics which has brought about this change in what is normal.

We can look briefly at this particular year in question. In 1955-1956, which is shown on this chart as a solid line, I call your attention to this solid line up to Christmas. The [94] total shipments for Christmas this year has been pointed out as 2,600 carloads. Now, that is not much different from what it used to be in one week. And when you take this 2,600 carloads away from the total shipments of 12,289 shown on the exhibit, means that almost 10,000 cars move after Christmas when we used to almost complete shipments in some years by Christmas. So in this year the calendar wouldn't even permit the shipments to be finished under what used to be considered normal even if nobody had any navel oranges except Central California. In this case you would have this change whether or not there was a prorate or not.

Q. Would you think that this is a condition that will probably prevail in the future as well as during the past year or few years?

A. As a matter of fact, Mr. Griffin, I expect the situation to be accentuated because the outlook based on the new acreage that has been planted in

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

Central California, there is considerable new acreage and increased bearing surface, that the tree crops in that area instead of being 12,000, 13,000 or 14,000 cars, as they now are, are likely to increase up to 20,000 carloads. So with that outlook for the future I would say that the normal situation may not even be this way, but the season might be extended even further to what it is now. It is a change in the economic situation, Mr. Griffin, that has brought about this change in what might be called normal— [95] using the word “normal” loosely.

Q. In the past, Mr. Street—I am referring to Mr. Coogan's Exhibit No. 3, sir—in the past it indicates that Central California has marketed, for example, 86 per cent, 90 per cent, 88 per cent or 85 per cent of their crop in fresh fruit channels during the past 10 years, approximately. Do you feel as a result of this change in economics and this change in the pattern of marketing that possibly there will be a change in the percentage of fruit that can be marketed from Central California in fresh fruit channels?

A. Mr. Griffin, that involves a lot of factors. Unless the demand increases through increased population, things of that kind, or the oranges in Florida disappear, for instance, why that would be the only result possible if these other things should happen.

Q. Is the production in Southern California re-

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

maining static or is it decreasing to make a place for the increased production in Central California?

A. Let me answer that in this way: The production in Southern California has declined from about 35,000 carloads until the present time I would estimate on the average that we could expect production of around 15,000 carloads. Now the outlook for the next five to seven years would be that that decline would not continue very much. It might go down maybe another thousand or 2,000 carloads at the most because the [96] declines that have been made primarily have been in the urban areas where the land was of more value for homes and industry. But the acreage that is left, the major part of the best production areas is in Riverside, Redlands, Highland, Corona and it is not likely that there will be much of a decline.

Q. Well, would you say the declines that have been made in Southern California in view of your testimony on the economics of the situation have helped to alleviate the problem that otherwise might have arisen in the marketing of Central California fruit?

A. Well, that certainly is true. As a matter of fact, where it used to be normal to have Central California conclude the crop by the first of February and this year just past there was marketed after the first of February perhaps as much as five or six thousand carloads as shown in the exhibit. So that has moved in and has taken part of the market

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of M. D. Street.)

that was normally filled by the Southern California crop. So that has been greatly eased by the fact that there is this reduction in the Southern California crop.

Q. Mr. Street, have you prepared a similar graph covering shipments of navel oranges in fresh fruit channels in Southern California?

A. Yes; we have that also as an exhibit.

Q. And that was based on Exhibit No. 2 which Mr. Coogan prepared? [97]

A. That is correct.

Q. Are there any comments that you wish to make with regard to the patterns shown by this graph?

A. Mr. Griffin, with this very revolutionary change in the weekly market for navel oranges, where the market, or, rather, where the demand declined from perhaps an average 1,800 to 2,000 cars a week to what is generally considered by the members of the Navel Orange Committee and marketing agencies as being perhaps 800 to a thousand cars a week or about half what the demand used to be, it has been necessary to modify not only the pattern in Central California by extending their season, but it has also been necessary to extend the Southern California navel orange season also.

In this exhibit, this chart which we have just mentioned, there is shown three lines similar to those that were in the one earlier that I discussed for Central California.

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

Now, the five-year average, 1946-1947 to 1950-1951 shown by the dash and dot line, and the three-year average 1953-1954 to 1955-1956, is shown by the dash line, and data for the single year 1955-1956 is depicted by the solid line, and I think that it is indicated quite clearly what the pattern is.

Q. When the large volume of oranges marketed in prior years, for example, as shown by the five-year average there, Mr. Street, during what months?

A. The highest marketings were made in February, the [98] latter part of February and through March, but the biggest decline from the earlier period to the present time has been during February and March.

Q. And now during what period, or might I ask during what period for the year 1955-1956, for example, were the large volumes of marketings made?

A. The heaviest marketings made there were made as indicated on the Exhibit No. 2 and this chart during April.

Q. And rather substantial marketings were made also during the month of May, were they not?

A. In this season I believe that the records would show Southern California shipped a greater proportion. I am sure that they did, I don't believe—I am sure that they shipped a greater proportion after April 1st than they have done in history.

I would like to comment a bit more on that. Looking at Exhibit No. 2 at the actual figures after April 1st there has been shipped out of the total amount

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

during the season of 1955-56, a total of 13,632, which is about half or about 50 per cent. Now, over a long period of time it has been typical of Southern California movement that by the first of April that 65 per cent or 70 per cent would be moved and that after that time there would remain around 30 per cent to 35 per cent that would move. So that there has been a definite extending of the season in Southern California as well as in Central [99] California.

Presiding Officer Gifford: That figure you referred to, are you referring to cars?

The Witness: That refers to carloads, yes.

Q. (By Mr. Griffin): And would you say that this change in the so-called marketing normal, Mr. Street, has been brought about by the same economic conditions that you described in discussing the graph covering shipments from Central California?

A. I would say so, Mr. Griffin. And to try to make this a little clearer, in attempting to make this as clear as possible, if we take the figures on Exhibit 1 for the entire season for each of these years shown and add to them the season figures shown on Exhibit No. 2—that is, add together Central California and Southern California—you can get the totals. And I would like to mention a few of these totals:

In 1944-1945 total shipments from the two areas shipped in regulated markets was 40,227 cars. The next year, 1945-1946, in this period when the de-

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

mand was not affected by this frozen orange concentrate, it dropped to 31,593 cars. There was not even any need for prorate in that case because it was considered such a small volume that you could market almost 2,000 cars a week. The next year, 1946-1947, 34,963 cars. The next year, 1947-1948, was 32,695. And at this time we get a change in the whole economic situation.

In 1948-1949, those of us that are in the citrus business [100] will remember that we had one of the worst freezes in history, certainly the worst since 1936-1937, and there were only 18,632 cars shipped from both areas combined. Then the next year, 26,451 from both areas in 1949-1950. Then in 1950-1951, 26,755. And then we do not have the figures for 1951-1952 and 1952-1953 because there was no agreement.

Now the last three, the latest three years shown where there is an entirely different situation, the total volumes marketed in the two areas combined as follows:

The first year being 1953-1954, total of 23,166 cars. Next year, 25,039 and the latest year, this year, 1955-1956, was 25,921. Now there are about 25 weeks during the navel orange season from both districts which is about from the middle of November until about the middle of May, and the exhibits clearly show that. There are about 25,000 cars, which is about what the market has developed to be, so that means an average shipment of about a thousand

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of M. D. Street.)

carloads a week through the 25-week period. Now there are some weeks when you can ship more and some weeks when you cannot ship as much, but the average would be about that.

Now this season just closed, there was 13,500 tree crop in Central California, and 17,000 cars in Southern California, which is 31,500 cars. It is clear that there is a problem when you have got five or six thousand cars more than the market will absorb at a price that means any return to the [101] grower. Later on, Mr. Griffin, we have some testimony as to what happens to prices when you try to ship 1,800 or 2,000 cars, I mean when you try not to make them at 1,800 or 2,000 but try to ship 1,300 for several weeks.

Q. Mr. Street, before you go to that, do you have any further comments that you wish to make regarding the graphs that have been prepared on shipments of navel oranges from Central California, and Southern California particularly as that relates to what is normal today as compared to what was normal four, five or six years ago?

A. I think not, Mr. Griffin.

Mr. Griffin: Mr. Presiding Officer, we would like to ask that the graph covering the shipments from Central California be marked as the exhibit next in order. I believe that would be No. 6.

Presiding Officer Gifford: That is right, and that will be identified and admitted in evidence as Exhibit No. 6. That is the graph portraying the mar-

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

keting in Central California or from Central California.

(Respondent's Exhibit No. 6 was received in evidence.)

Mr. Griffin: And we would also like to ask that the graph portraying the marketing from Southern California be marked for identification as No. 7 and be admitted in evidence. I believe that Mr. Street has already identified that fully. [102]

Presiding Officer Gifford: Yes. That will be all right, and that will be identified as Exhibit No. 7, the graph showing weekly domestic navel shipments from Southern California for selected periods. That will be identified as No. 7 and received in evidence.

(Respondent's Exhibit No. 7 was received in evidence.)

Q. (By Mr. Griffin): Mr. Street, have you also prepared or had prepared under your direction and supervision an exhibit comparing prices which were received for navel oranges from Central and Southern California during the period since the marketing Order No. 14 has been in effect?

A. Yes; I have, Mr. Griffin.

Q. Would you indicate where this information came from and what the exhibit purports to show?

A. This information presents average f.o.b. prices received by Sunkist growers for each week from the week ending March 3rd to the week ending

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

June 2nd for the three latest seasons available, namely, 1953-1954 through 1955-1956.

Q. Is there any explanation that you can give as to why there is a difference, a slight difference in the price that is received or that has been received for Central California navels as compared to Southern California navels in 1955-1956 and indicate why the same or comparable differences are not [103] apparent or do not exist in the other two years?

A. Mr. Griffin, there are certainly reasons why prices are what they are and there are reasons why there are differences in the weekly average prices received by Sunkist for navel oranges sold from Central California and those sold from Southern California. In the 1955-1956 season throughout March and April the price differential which Southern California oranges brought over Central California navels was about 25 cents. The figures, just to quote a few: 24 cents, 17 cents, 23 cents, 20 cents, 19 cents, 29 cents, 25 cents, 24 cents and 23 cents. In other words about an average of 25 cents throughout this period. Then during the month of May that increased to about 32 cents or 33 cents.

Now I don't think that anyone, Mr. Griffin, can say exactly why these differentials existed but they did exist throughout this period in favor of Southern California navels.

Q. Do factors such as sizes produced in one area

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

as compared to those produced in the other area enter into prices that are received?

A. Well, there are a number of factors, Mr. Griffin. Generally speaking, the sizes of navel oranges in Central California are larger than in Southern California and at times bring a premium for that reason. Also, it is the general eating quality that causes our navel oranges to sell at the excellent prices that they do. It depends on relative [104] supplies, the sizes or the oranges, and the general eating quality and the general appearance, and all of these factors that actually determine these differentials.

I would like to emphasize that this differential in this particular season prevailed for quite a long period and it didn't just happen over the first of April or some other period; it prevailed through March and certainly the quality was excellent in Southern California.

Now if we look at 1954-1955, you will find that the reverse situation is true of Central California navels bringing a substantial premium over Southern California oranges. In the week ending March 3rd, you will see that it was \$2.48 as compared to \$2.08, which is 40 cents more for Central California oranges. The next week it shows a plus 20 cents, the next week the same, the next 20 cents, the next week the same, the next week the same. The week ending March 31st Central California shows five cents plus. On April 7th as the season gets later, Central Cali-

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

ifornia was still \$2.61 as compared to \$2.38 for Southern California. The next week it was \$2.68 over \$2.47. The next week \$2.88 over \$2.51, and the week ending April 28th, it was \$3.00 as compared to \$2.48. So there again it is indicated that they consistently brought a premium.

So in considering the factors responsible for that size was certainly one general condition and also the eating quality would be another. As I say, it is hard to measure what they are. [105]

If you will look quickly then at 1953-1954, you will see that the prices are very close together, and there is almost no difference. So, Mr. Griffin, the fact that there is a differential in any given week for navel oranges sold from one area as compared to another depends on many things and it is difficult if not impossible to reach a conclusion as to what one factor would be the cause.

Q. Would you say another significant part of the exhibit is to show that where a differential exists, usually the differential prevailed during an entire season which indicates that it must be due to factors that prevailed also throughout an entire season? A. I think that is true.

Q. Mr. Street, did you prepare a similar exhibit relating only to the 1955-56 season?

A. Yes; I have, Mr. Griffin, and it shows the same figures for 1955-1956 as we have just discussed on the present chart but in addition it shows the volume of oranges sold from each area during each

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

week, and that is the only purpose of making this additional exhibit.

Q. Mr. Street, have you prepared an exhibit that pertains to the over-all on-tree returns which producers in Central California affiliated with the Sun-kist organization have received during the past season? A. Yes; I have. [106]

Q. And have you made a comparison of those returns with the returns received in 1953-1954 and 1954-1955? A. Yes; I have.

Q. Do you have any comment that you wish to make regarding these?

A. Yes; I do. In order to compare results to producers in these three years, the most recent three years, we have taken the best and most reliable data which was available. It isn't possible to go out and find out from each individual grower how much his returns are, because all of those returns are not received yet and it couldn't be done anyway. But we do have a basis that we feel will give extremely reliable results.

In this table we have prepared, we show in column 1 for each of the latest three years the total number of standard carloads shipped in regulated outlets only. That is for the U. S. and Canada and Alaska. These figures, respectively, are: 11,509, 13,304, 12,289, ending in 1955-1956. Then in column 2—excuse me, I would like to go back to column 1. Those are the official figures from the records of the

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

Navel Administrative Committee so there is no guesswork or any estimating about those.

In column 2 the figures are shown as on-tree price for these volumes shown in column 1. Now there is some estimating done there that I would like to explain so everybody can draw [107] their own conclusions as to validity. We have taken the average f.o.b. returns for all packed and loose navel oranges sold for the entire season in each of these seasons and for the 1955-1956 season through the last possible date. Anything not included in that would not change it over a penny or so but I wanted to explain that that is partly estimated but probably not for more than over a penny. We have taken the Sun-kist average f.o.b. prices as a base, and from those we have subtracted California Citrus League costs for picking, hauling, packing and Sunkist's costs of selling and advertising.

Q. What do you mean by the California Citrus League costs, Mr. Street?

A. Those are costs that have been compiled by the joint efforts of factors in the industry such as farm advisors in the various counties that have worked on this program. The California Citrus League is a joint industry program of all factors that have been used for two purposes primarily, one traffic cases to help maintain a fair freight rate situation and the others to obtain the best cost factors possible. Those picking and hauling and packing costs are obtained from quite a large number

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

of houses, certainly a representative number of houses, and are considered by everyone to be very representative of the entire industry. As a matter of fact, they are the only cost figures that are available and they are used and accepted as official figures by everyone. [108]

So, from Sunkist prices we have subtracted these costs in order to arrive back at the amount of money per box which the grower would receive as his check for his returns.

Q. This is on a per carton basis?

A. I am sorry if I used the word "box." Yes; this is on a per carton basis. This is the first year we have used the per carton figures and I still when I talk sometimes use the term "boxes."

So that the only estimating that is involved in here primarily is that they are estimating f.o.b. prices received by growers outside of Sunkist growers—which by the way represents about 30 per cent or a little under 30 per cent of the navel orange crop—are the same f.o.b. prices. Now maybe that is a little different but it would not change the result very much, certainly, and if it did, it would not be a significant amount. So multiply the volumes from the Administrative Committee's figures shown in column 1 by the on-tree prices here shown in column 2 as I have described and you arrive at the figures shown in column 3 which, in my opinion, would very closely approximate the net grower returns on the tree which he gets.

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of M. D. Street.)

Q. You have shown those figures, Mr. Street, there for three seasons, the 1955-1956 season showing the largest on-tree returns to the producer. Do you know how that figure for the 1955-1956 season compares with the years prior to 1953, 1954, which are not shown here? [109]

A. These figures which show the latest to be \$15,600,000 far exceed most of the previous years. In one more year where everything was extremely favorable and there was a large crop and there were not enough food in many places and we were still on rationing, I believe it was the year 1944-1945 when those things prevailed, the returns on tree were approximately the same. But with that exception by far it is the best year we have ever had.

And, Mr. Griffin, I would like to emphasize that that to me is a miracle in view of the fact that as of January 1st California suffered one of the worst disasters in having marketed such a very small percentage, only 2600 cars up to Christmas, the figure that we talked about earlier. It is generally conceded that that is about the worst situation that has ever happened to Southern California in the history or in the memories of anybody that I have talked to about it. And one other thing that I would like to comment on concerning that subject about this season being favorable, and that is that this 2600 cars up to Christmas, that was not affected

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

by the Orange Administrative Committee because in the early weeks——

Q. Before you go on, might I ask, are you a member of the Orange Administrative Committee?

A. Yes, I am.

Q. How long have you served on that committee? A. Since 1949. [110]

Q. That is, you have served as a member of the old Orange Administrative Committee and now you serve as a member of the Navel Administrative Committee?

A. Yes, since 1953-1954. So that I think that that was the most desirous, and the committee was very desirous to know as much about the factual information as possible. And the facts are that in the early weeks of the Central California season the Navel Administrative Committee had nothing to do with the situation because it was possible for all shippers in Central California to ship as much fruit as they pleased; all it was necessary for them to do was to ask for an early maturity and it was granted. And it is also a fact that all of the early maturity requests were granted. Also, there were two weeks in December that were considered the best weeks and that was all under open movement. So that the Committee only put restrictions that had any effect whatsoever in the two weeks closest to Christmas. In other words, at a period as to which it was impossible to ship or-

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

anges out of California and reach the Eastern markets. And when there is no control on shippers and too much fruit is shipped and it arrives in the Eastern market say on December 24th to December 27th, it simply will sit on the track and all you draw is demurrage and it results in disaster to the growers. So it is generally felt by everyone that there was no restriction put on anybody on the oranges that they moved up to Christmas with the possible exception of a few [111] cars in the dead spot after the holiday season.

Q. In your opinion, Mr. Street, was the fact that only 2600 cars were marketed before January 1st in Central California the principal contributing factor for the lateness of the season as far as Central California was concerned this year?

A. The principal contributing factor of, for the lateness of the Central California and the latest season that Southern California navel shippers had ever had, it would be the principal factor for both.

I would like to say one thing more, Mr. Griffin, and that is that the only thing that saved this from being a disastrous season which it started out to be as a result of late shipments brought about by maturity and weather, was a disaster in Spain. Spain lost virtually the entire crop on the trees about the first of February which opened up foreign market areas for the Arizon Valencias and Central California Valencias as well as Southern California

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

Navels, which made it possible to market 3300 carloads of Southern California navels after the first of May, which is a thing that is unknown in the industry before.

Q. Were you serving on the Navel Administrative Committee during the entire 1955-1956 season?

A. Yes.

Q. Were you present at the time that Mr. Tyrrell testified here today?

A. On his regular testimony, I wasn't here during all of [112] the cross-examination.

Q. But you were here during his direct examination? A. Yes.

Q. Would you say that his testimony to the effect that the Navel Orange Administrative Committee generally followed the recommendations made by the Little Industry Committee was correct?

A. My recollection, Mr. Griffin, is that the Navel Orange Administrative Committee followed those recommendations almost to the car through about the month of February.

Q. Do you recall, Mr. Street, representatives from the Central California area making the statement to the Navel Orange Administrative Committee on repeated occasions that they wanted to get a price for the oranges rather than to market the entire crop?

A. Well, that is the statement that has been made at so many meetings throughout the season, Mr.

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

Griffin, I do not remember which one, but it has been made numerous times by the California-Arizona representatives, and the statement I think is concurred in by growers both Central California and Southern California. The whole purpose of having the program is to increase grower returns. It is the easiest thing in the world to ship all the fruit.

Q. Are you acquainted with Mr. Roscoe, from Central California? [113] A. Yes, I am.

Q. Do you know what group he represents?

A. He represents Independent shippers, the independent shipper group, and I guess he represents American Foods. But I know Mr. Roscoe represented the independent growers.

Q. Do you ever recall hearing Mr. Roscoe say at a meeting of the Committee that the people that he represented wanted to get a price for their oranges and did not want to market all of them?

A. Well, he was the same as everyone else and I do remember him saying that this was their policy.

Q. Mr. Street, were you present on the two occasions when Mr. Luther Woodall was present at the meetings of the Navel Orange Administrative Committee?

A. I don't remember the date but I remember that Mr. Woodall was present at two meetings.

Q. And were you present when Mr. Coogan testified on direct examination regarding statements that were made by Mr. Woodall?

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

A. I was.

Q. And do you concur in the statements made by Mr. Coogan as to what he said?

A. I don't remember all the statements that he made.

Q. Well, let me ask you specifically, do you recall whether Mr. Woodall stated to the Committee that regardless of [114] what they did concerning prorate in Central California, he and his organization were going to ship all of their oranges?

A. I don't remember the exact words, but I remember the intent of his statement was——

Mr. Weikert: Just a moment. I am going to object to his giving the intent.

Presiding Officer Gifford: That's right; he can give the substance.

Q. (By Mr. Griffin): All right. You can give us the substance of it.

A. The substance of it was that he was much displeased with the Administrative Committee and that he was going to move his crop.

Q. Did he state in substance that he was going to find a way to do it?

A. Well, in substance. And, Mr. Griffin, there is one point that I would like to cover on the table and I don't believe it has been given an Exhibit number, but the table comparing prices of Central and Southern California for this season.

Mr. Griffin: Mr. Presiding Officer, it might be

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

well to identify these. We would like to ask that the exhibit referred to be marked as the exhibit next in order.

Presiding Officer Gifford: That is the Sunkist f.o.b. prices of Central and Southern California, shipments by weeks [115] from March to May, and that will be identified as Exhibit No. 8.

Mr. Griffin: And this one also, please.

Presiding Officer Gifford: That will be No. 9, and that is the one referring to Sunkist.

Mr. Griffin: And I believe the next one, your Honor, refers to Sunkist Interstate Sales f.o.b. Prices by Weeks, for the week rather of May, 1956, only as distinguished from the three years.

Presiding Officer Gifford: That is right, and that will be identified as Exhibit No. 9.

Mr. Griffin: And the third one, which will be Exhibit No. 10.

Presiding Officer Gifford: Exhibit No. 10 will be identified, that is the industry domestic shipments and on-tree returns of Central California navels.

(Respondent's Exhibits Nos. 8, 9, and 10 were received in evidence.)

Q. (By Mr. Griffin): Mr. Street, I believe you had a further comment which you wished to make in regard to Exhibit No. 8.

A. No, Exhibit No. 9, the comparison of the two years' sales.

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

Q. Yes, that would be the prices and sales volume.

A. Well, Mr. Griffin, through the month of March, as [116] shown in this exhibit No. 9, we had very excellent returns as is shown in columns 3 and 4 for Central California and Southern California. The returns for Southern California being about \$2.50 a carton f.o.b., and for Central California about \$2.25 a carton f.o.b. during three or four of the weeks. During this period as a result of the very late start there was tremendous pressure from Central California growers and shippers, as well as from Southern California growers and shippers, for the Committee to increase their shipments. Partly as a result of that the Navel Orange Administrative Committee set weekly allotments at 1350 cars a week, which was considerably above what we had been doing, which was around 1,000 to 1100 cars.

As a direct result of the increased shipments, sales did not keep pace with shipments so that for about four weeks in a row shipments exceeded sales. Now that is not shown on this exhibit, but that is on the records that Sunkist has. As a result of shipments exceeding sales over this period of time when we set these higher shipments—by higher shipments I mean 1350 cars—as a result of that our track and rolling supplies built up heavily. Cars were accumulating on the tracks unsold and the percentage of cars sold in the auctions was

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

building up far beyond the point that could be justified. And the result of that is shown here for the prices received for the weeks ending April 7th and April 14th. The price went off [117] so that Central California prices dropped to \$1.87 a carton as of April the 7th and April 14th it was \$1.75 a carton. And then for the South for two weeks it was \$2.16 and \$2.00.

Now that only happened in a very brief time from overshipment; so the Committee, seeing that the track and rolling supplies and the supplies unsold in the market was far past anything that could be sold, they took drastic action and cut it back, cut the allotment the next week to a thousand cars. As a result of that we are able to get the supply and demand situation back in balance. The results of that are shown in the prices during the succeeding weeks, where we recovered the market to the former level and perhaps even higher. I don't know how you can illustrate it in a better way, this problem or these problems of control of weekly shipments. Every time you slip over a certain amount, you run up against the market which is very, very sensitive with this competition of cheap oranges—and as I say, they are cheap. And then the price received for California-Arizona navels in the market at the wholesale level will almost double those received in the same market at the same time by Florida.

If you compare them with the prices for oranges,

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

for orange juice and frozen concentrate, it is three or four times. That is one of the reasons why it is so critical as to how much is shipped. And in order to increase the weekly volume with these thousands and thousands of cars, you have to go to the [118] consumer buying Florida oranges and get them to switch, and in order to do that it is necessary to lower the price as low as a dollar a carton.

Q. Mr. Street, petitioner here has alleged in his petition that all handlers should be exempt from the Navel Marketing Order No. 14 or that the order should be terminated. Now, based upon the testimony that you have given as to the history of what has happened during the past season, what would you say would occur or would have occurred during the past season if there had been no marketing order?

A. Mr. Griffin, no one could ever tell exactly what would happen. But I can speak from my own opinion based upon my experience and training in economics and my experience as head of marketing research at Sunkist and it is my opinion that instead of an f.o.b. return for the entire navel crop sold this year, which amounted to about \$2.22 or \$2.23 f.o.b. per carton, that the returns would have been not over \$1.50 a carton, which would have been \$3.00 a box f.o.b. under the old box basis. And I might say that my opinions are shared by people in the other marketing organizations outside of Sunkist. So it isn't just my guess. I don't think that

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

there is one single individual who knows anything about marketing could help but say that this would have been a disastrous season without control with the terrific supply backed up and with the very sensitive weekly amount that can be sold. If the market [119] will take 900 cars of navels, which it does on the average through the month of January, and perhaps 950 or a thousand during February, if you just increase that weekly volume 100 cars, the market goes over 25 cents or 50 cents a carton; if you increase it a couple hundred cars, you haven't got any market at all. And whether or not a large number of shippers with each one operating independently of the other would have the wisdom and cohesion and control of this thing and not overload the market, it is very doubtful.

Q. Has history ever demonstrated that has been done in the past?

A. My observation is that it hasn't. It is a little difficult to tell because we have had a marketing program almost every season since about 1934. One season we didn't have one, namely 1952-1953, and the navel orange season ended up with about 32 per cent to 33 per cent of parity. To put it another way, what it meant was red ink to most of the navel orange growers.

Now it is true that Central California growers fared very well on shipments up to about Christmas. That wasn't because they didn't have a prorate. It wasn't a committee to prorate but the

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

weather. So shipments held, were held in line by the weather in the early season of 1952-1953. After the shippers were able to get the fruit out and it got to the later part of the season, I think the figures show that it would be a [120] disastrous season.

Q. In the alternative, Mr. Street, the petitioner has asked that they be exempt from the provisions of the order. Do you think it would be fair or equitable to exempt this petitioner from the order and still require other handlers to comply with these restrictions?

A. Mr. Griffin, it would be an advantage to an individual handler to be exempt and have the other handlers have the burden of carrying the market. But it is obvious that that would be completely unfair to the other handlers.

Q. It is almost so obvious that it needs no explanation?

A. To me I cannot imagine how anyone could reach but one conclusion on that one.

Q. Do you have anything further that you would like to say in regard to the exhibits that have been offered and the testimony you have given?

A. I think we have pretty well covered it.

Mr. Griffin: I have no other questions.

Presiding Officer Gifford: Before we go into the cross-examination, do you want to offer Exhibits 8, 9 and 10?

Mr. Griffin: Yes, I am sorry. I would like to

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of M. D. Street.)

offer Exhibits 8, 9 and 10 in evidence at this time.

Presiding Officer Gifford: They will be admitted in evidence and made a part of the record.

(Respondent's Exhibits Nos. 8, 9 and 10 were received in evidence.) [121]

Cross-Examination

By Mr. Weikert:

Q. Florida oranges have never been subjected to volume regulation, have they?

A. To my knowledge, they haven't. They have grade and size.

Q. But never volume?

A. I don't believe they have.

Q. Mr. Street, in preparing Exhibit No. 8 did you include fruit sold within the State of California?

A. We did include all fruit sold both packed and loose.

Q. And that is including California?

A. On a packed basis. That is loose fruit.

Q. Does that include orchard run?

A. It includes all fruit, choice and orchard stands.

Q. In preparing Exhibit No. 10 did you proceed upon the assumption that all handlers sold their fruit at the prices received by Sunkist?

A. I did. Yes, I did that. We have no better assumption, Mr. Weikert.

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

Q. You mean by that, you mean you do not have any available data?

A. We had to assume and we felt that it was the most reasonable assumption to make that their returns were comparable to Sunkist's and we have no reason to believe that they vary [122] very much.

Q. Would you say that it is a fact that the Southern California navel growers this past season shipped more of their fruit than they shipped in any other two previous seasons?

A. No question about it, that they shipped a larger proportion of their fruit than in any other two preceding seasons.

Q. And is the same true of Central California growers?

A. I don't recall—I would have to see the utilization figures on that. I do not know if we have those in exhibits or not but there isn't very much difference. They have shipped in fresh outlets during the past several seasons around 90 per cent so there is not very much difference.

Q. In view of the lateness of the hour I think that is all.

Mr. Griffin: I have just one question or so:

Redirect Examination

By Mr. Griffin:

Q. Referring to the exhibits, isn't it true that there were shipped a higher percentage of crop

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

from Central California this year than last year?

A. This shows 85.6 as compared to 83.69.

Q. In fact, they shipped more percentagewise this year than during six of the last ten years, approximately, haven't they, according to that exhibit? [123]

A. Well, the exhibit shows it, Mr. Griffin.

Mr. Weikert: That doesn't take export shipments into account?

The Witness: This is under regulation.

Mr. Weikert: So, if volume of export shipments varied from year to year, that would not be reflected in that exhibit, would it?

The Witness: No, it wouldn't, Mr. Weikert.

Q. (By Mr. Griffin): If the volume of export shipments was up in any one year and the shipments in regulated channels were comparable, the end result would be that more fruit was sold in the fresh fruit market than prior years, would it not?

Mr. Weikert: How is that again?

Mr. Griffin: Well, I will start over.

Q. (By Mr. Griffin): If the volume of export was up this year as compared to other years and your volume that was sold in fresh fruit channels was approximately the same—exports of fresh fruit—I mean the domestic regulated fresh fruit channels, the total volume of fruit sold in fresh fruit channels would be greater this year than in other years?

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

A. That probably would be the result.

Presiding Officer Gifford: Is there anything more?

Mr. Griffin: I have nothing further. [124]

Mr. Weikert: That is all.

Presiding Officer Gifford: You may be excused.

(Witness excused.)

Mr. Griffin: I will call Mr. Hersey.

Whereupon,

GEORGE HERSEY

was called as a witness by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Griffin:

Q. Will you give your full name and address?

A. George Hersey, Route 1, Box 75, Lindsay.

Q. And by whom are you employed?

A. The Navel Orange Administrative Committee.

Q. In what capacity?

A. As Central Supervisor.

Q. And how long have you occupied that position?

A. Since the new Order went in.

Q. And that would be since 1953; is that correct?

A. Right.

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of George Hersey.)

Q. What was your occupation prior to your present position?

A. I started work with them in 1941 as a field man and I was three and half years in the service.

Q. So except for the time that you were in the service, [125] you have been with them since 1941?

A. Right.

Q. Mr. Hersey, what were the conditions that existed in Central California with regard to weather and maturity of oranges during the early part of 1955-1956 season?

A. Well, it had a bad start, the fruit was late maturing, and they had lots of rains and the boys couldn't get the fruit picked.

Q. When you say the fruit was late maturing, compared to prior years how late?

A. Oh, two weeks or over, we had an off-bloom condition in lots of the groves there and when you get a few of those in test, it knocks the test clear down.

Q. Did this contribute to the quantity marketed and picked from Central California at this time?

A. It did.

Q. Would you say that that was the primary if not the only reason that only 2600 cars were marketed and moved at that time?

A. Yes, we would have moved a lot more fruit if we could have got it picked.

Q. Was there any restriction at all placed upon the marketing as far as you can see or as far as

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of George Hersey.)

you know by the Navel Orange Administrative Committee prior to Christmas?

A. No, we had two weeks of open movement and also two [126] weeks of early maturity, and those that applied for early maturity got it.

Q. And under the early maturity request and open movement, a handler can move as much as he wants?

A. If the Committee grants the early maturity.

Q. And during the past season weren't all requests for early maturity granted?

A. Right.

Q. Mr. Hersey, in your capacity as supervisor for the Navel Orange Administrative Committee, are you familiar with the condition of the fruit in Central California and its keeping qualities?

A. Yes.

Q. Were you here at the time that Mr. Seares testified? A. Yes, I heard his testimony.

Q. And would your testimony be substantially the same as his with regard to the keeping quality of the fruit?

A. Yes, I believe it depends on the time that you get the fruit started. In other words, when your fruit tests get started, then you have a shorter period of time.

Q. And except for the fact that they mature at different times, the keeping quality of Central California and Southern California navels is approximately the same?

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of George Hersey.)

A. I can't tell too much about Southern California because I haven't worked down here for years. [127]

Q. Was there any real bad deterioration in the navel oranges in Central California after the first of April to the extent that it made them so they could not be marketed?

A. No, they could be marketed.

Q. Isn't it a fact that a large quantity were marketed at a very good price?

A. I imagine so. All I see is the bulletin, so I can't tell.

Mr. Griffin: Very well. I have no further questions.

Mr. Weikert: No questions.

Mr. Street: I would like to be recalled, Mr. Griffin, for just a moment, if I may, to clarify something.

Mr. Griffin: Very well.

Whereupon,

M. D. STREET

was recalled as a witness herein, and having been previously duly sworn, testified further as follows:

The Witness: I want to have all this testimony as absolutely correct as possible. In my earlier testimony with regard to Exhibits 8 and 9, Mr. Weikert asked me a question which I answered incorrectly, and it is evident that I did because it is in the title.

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of M. D. Street.)

In answering that, Mr. Weikert, I had in mind Exhibit No. 10 which does include your California sales. On our titles here for Exhibits 8 and 9, the title says, "Interstate Sales," which [128] would exclude California sales, and I am sorry for that wrong information on your question.

Mr. Weikert: O.K., thank you.

Presiding Officer Gifford: Is there anything further? Very well, you may be excused.

(Witness excused.)

Mr. Griffin: I will call Mr. Beard.

Whereupon,

WILFORD S. BEARD

was called as a witness by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Griffin:

Q. What is your full name and address, Mr. Beard, your business address?

A. Wilford S. Beard; my business address is Room 1005, 1031 South Broadway, this building.

Q. By whom are you employed, Mr. Beard, and in what capacity?

A. I am Resident Agent, Program Appraisal and Audit Division, Agricultural Marketing Service, U. S. Department of Agriculture.

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of Wilford S. Beard.)

Q. In this capacity, Mr. Beard, were you called upon to make an examination of the books and records of Lo Bue Brothers? [129]

A. Yes.

Q. And in connection with the examination of those books and records, did you also examine the books and records of the Navel Orange Administrative Committee? A. Yes.

Q. Will you please tell us what the books and records showed with regard to the prorate which was available for the week ending at 12:01 a.m. on April 8th and the shipments that were made by Lo Bue Brothers, and the prorate that was available for the period ending at 12:01 a.m. April 15th, and the shipments made during that prorate period?

Mr. Weikert: Didn't Mr. Coogan cover that?

Mr. Griffin: I don't believe he covered it in exact figures.

The Witness: May I use my notes, crude as they are?

Mr. Weikert: I would like to know what this is.

Q. (By Mr. Griffin): Mr. Beard, what is the paper you refer to?

A. Simply my reference notes showing in totals.

Q. Were these notes made from the records that you have examined?

A. Those notes reflect the end results of my findings, yes.

Mr. Weikert: There must be some better records than this.

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of Wilford S. Beard.)

Mr. Griffin: Those are the original notes, Mr. Weikert, [130] which are the best evidence, for refreshing his recollection.

Mr. Weikert: I know, but this purports to set forth what their adjusted allotments were.

Mr. Griffin: Well, I asked him whether or not he had examined the records of the Orange Administrative Committee to ascertain the allotments. If you prefer to have Mr. Coogan back on the stand, I will have him do so and testify from the records.

Mr. Weikert: Well, if Mr. Beard admits they are crude——

Presiding Officer Gifford: Off the record.

(Discussion off the record.)

Presiding Officer Gifford: Back on the record.

Q. (By Mr. Griffin): Mr. Beard, while you are on the stand you might give us the shipments then and then we will ask Mr. Coogan to give us the allotments, the adjusted allotments.

Do you have the shipments that were made by Lo Bue Brothers on Saturday, April 7th?

A. Yes.

Q. How many cartons were shipped?

A. 23,416.

Mr. Weikert: How many?

The Witness: 23,416.

Q. (By Mr. Griffin): And how many cartons were shipped on Sunday, April 8th? [131]

A. 7,433.

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of Wilford S. Beard.)

Q. Now, Mr. Beard, do you have the figures covering the total shipments that were made between the dates of 12:01 a.m. on April 1st through April 6th?

A. I don't have it broken down that way, Mr. Griffin.

Q. Can you give it to us for each of those days then?

A. There were a total of 35,779 cartons shipped during the week ending April 8th.

Q. Very well. That is all right.

Mr. Weikert: What was that?

The Witness: 37—I'm sorry, 37,799.

Mr. Weikert: And that was during the week ending April 8th?

The Witness: Yes, to 12:01 a.m.

Mr. Weikert: That is a duplication of this other thing.

Mr. Griffin: Well, it includes those other figures.

Q. (By Mr. Griffin): How many cartons were shipped during the week of April 15th?

A. 16,281.

Q. And 7,433 of those were made on Sunday, April the 8th? A. Yes.

Q. Do you have the number of cartons that were shipped on Monday, April 9th?

A. 8,848. [132]

Q. And on Tuesday, April 10th?

A. I will have to retract that. That includes Monday and Tuesday.

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of Wilford S. Beard.)

Q. Your 8,000 figure or your 10,000 figure?

A. Yes, 8,848.

Q. And that includes Monday and Tuesday?

A. Yes.

Q. Do you have them broken down for the other days during the week?

A. Not with me, no.

Mr. Griffin: Very well, I have no other questions.

Mr. Weikert: I have no questions.

Presiding Officer Gifford: You may stand aside.

(Witness excused.)

Whereupon,

M. T. COOGAN

was recalled as a witness by and on behalf of the Respondent, and having been previously sworn, was examined and testified further as follows:

Redirect Examination

By Mr. Griffin:

Q. Mr. Coogan, you have previously appeared and testified in this hearing?

A. Yes, sir.

Q. Do you have with you the records of the Navel Orange [133] Administrative Committee pertaining to Lo Bue Brothers?

A. Yes, sir.

Q. Particularly as those records reflect prorate allotments made available to this concern?

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of M. T. Coogan.)

A. Yes, sir.

Q. Will you please advise us what the allotment was to Lo Bue Brothers for the period ending at 12:01 a.m. on April 8th, 1956?

A. They were allowed from the Committee 10,428 boxes. That is their advance allotment.

Mr. Weikert: Boxes or cartons?

The Witness: I am sorry; cartons, 10,428.

Q. (By Mr. Griffin): And were there some adjustments made?

A. There was an adjustment caused to be coming back to them that week from loans of 892 cartons. So that should be a total of 11,320 as the adjusted allotment for that particular week.

Q. What was the adjustment for the week ending on, ending at 12:01 a.m. April 15th?

A. The original allotment was 8,702. The previous week they had overshipped 10,000—I'm sorry, overshipped 1,043, which must be deducted. They owed to other handlers 262, and they received from other handlers 36, so their adjusted allotment would be 7,433 cartons for that week. [134]

Mr. Griffin: I have no further questions.

Mr. Weikert: No questions.

Presiding Officer Gifford: If there is nothing further, you may stand aside.

(Witness excused.)

Mr. Griffin: That concludes the testimony on behalf of the Government.

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of Mario Lo Bue.)

Presiding Officer Gifford: Is there any rebuttal?

Mr. Weikert: I would like to recall Mr. Lo Bue for two questions.

Whereupon,

MARIO LO BUE

was recalled as a witness on behalf of the Petitioner and, having been previously duly sworn, was examined and testified further on rebuttal as follows:

Direct Examination

By Mr. Weikert:

Q. Mr. Lo Bue, prior to this day have you ever heard of the Little Industry Committee?

A. No, sir, I never did.

Q. Have you any idea as to how one Theodore Roberts came to be a representative of the Independent Handlers in Central California?

A. On the Committee?

Q. Yes. [135]

A. Well, I never heard of the Little Industry Committee. Period.

Mr. Weikert: You may cross-examine.

Cross-Examination

By Mr. Griffin:

Q. Are you acquainted with Mr. Dick Stark?

A. I know him, but the fact is I haven't talked to him in five or six months or more.

Q. That would put it back to some time during

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Mario Lo Bue.)

the early part of 1956. Did you at any time during the early part of 1956 discuss with him the problems of the Central California handlers as far as shipping navel oranges is concerned?

A. I don't recall it.

Q. But you do not recall of having ever discussed it with him? A. No.

Q. You did not know that he was a member of an organization of Central California shippers and growers that met weekly to consider their problems?

A. I did not.

Q. Do you know Mr. Luallen? A. Yes.

Q. Did you ever discuss with Mr. Luallen the problem of the independent growers and shippers in Central California?

A. Yes. He come to my office not in regard to that. He [136] came and sold—he represented Pen-Vate Sales Company—and he come in to sell me some of that.

Q. Did you discuss with him at any time the recommendations that should be made to the Navel Orange Administrative Committee on shipments?

A. That was only last week when I talked to him.

Q. And you didn't discuss with him, you didn't know him or discuss it with him?

A. I knew him because I bought Pen-Vate from him before; I have known him for quite a few years.

Q. Did you know Mr. Roscoe up there?

Plaintiff's Exhibit No. 5—(Continued)

(Testimony of Mario Lo Bue.)

A. I couldn't pick him out if I saw him. I know I have met him but I couldn't picture him.

Q. Did you ever call him on the telephone and discuss with him what ought to be shipped during any one week? A. No.

Q. Are you member of the Independent Growers and Shippers Association up there?

A. No; in fact, I never met Mr. Tyrrell until just the other day.

Q. And you are not a member of any independent association in Central California? A. No.

Q. Are you a member of any association?

A. No. [137]

Mr. Griffin: That is all.

Mr. Weikert: What is Pan-Vate?

The Witness: It is a so-called soil conditioner.

Mr. Weikert: I see. I was just curious.

Mr. Griffin: I have just a couple of other things.

Presiding Officer Gifford: All right.

Q. (By Mr. Griffin): Mr. Lo Bue, do you know whether Mr. Luther Woodall, your sales manager, is a member of any independent shippers' association in Central California?

A. I don't know that.

Q. You don't know whether he is or isn't?

A. I never heard him mention that he was.

Q. But you really don't know?

A. I never heard him say; he never told me so to this day. I might add that I belong to the Agriculture Committee or some such committee as that.

Plaintiff's Exhibit No. 5—(Continued)
(Testimony of Mario Lo Bue.)

Mr. Weikert: Well, I will ask this: Insofar as you know, is there any independent shippers' association in Central California?

The Witness: I have heard there is.

Mr. Weikert: You heard that there was?

The Witness: Well, part of these boys down South, they all belong in it. It is not Central California; it is an organization of these independents in Southern California and Central [138] California, both, but I don't belong to it.

Presiding Officer Gifford: Is there anything further from either of you?

Mr. Weikert: I have nothing further.

Mr. Griffin: Nothing further.

Presiding Officer Gifford: Off the record.

(Discussion off the record.)

Presiding Officer Gifford: On the record.

(Witness excused.)

Presiding Officer Gifford: The time for filing briefs will be fixed as July 9, 1956. That means that they must be prepared and deposited in the United States mail on or before the close of that day. They must be addressed to the Hearing Clerk, Room 112, Administration Building, U. S. Department of Agriculture, Washington 25, D. C. The briefs must be printed or typed or mimeographed. They may be signed either by the attorney or by the party himself or the representative of the party. They need

Plaintiff's Exhibit No. 5—(Continued)

not be verified, but they must be based upon the testimony in this record.

Are there any questions?

Mr. Weikert: Is that an original and three copies?

Presiding Officer Gifford: They must be filed in four copies, the original and three, and addressed to the Hearing Clerk at the address given, on or before July 9, 1956.

If there is nothing further, the hearing will stand [139] adjourned at 6:30 p.m.

(Whereupon, on Thursday, June 14, 1956, at 6:30 o'clock p.m., the hearing in the above-entitled matter was closed.)

Received in evidence March 12, 1958. [140]

DEFENDANTS' EXHIBIT B

Agriculture Decisions Before the Secretary of
Agriculture, United States Department of
Agriculture

(No. 4879)

In re Lo Bue Bros. AMA Docket No. 14-1. Decided
December 3, 1956.

Order No. 14—Regulation of Shipments of Navel
Oranges—Validity of Weekly Prorate Orders

The petition alleges discriminatory restrictions on
weekly shipments of the 1955-1956 orange crop

Defendants' Exhibit B—(Continued)

from the Central California prorate district and unlawful regulation beyond the historical marketing season. The record in this proceeding contains no evidence of such discrimination. Because of the late maturity of the crop involved, adverse weather and changed economic conditions, the period of regulation was extended. The means selected by the Secretary to carry out the statutory policy of the act are found to be in accordance with law.

Mr. G. V. Weikert, of Los Angeles, California, for petitioner. Mr. John S. Griffin, for Agricultural Marketing Service. Mr. Glen J. Gifford, Hearing Examiner.

Decision by Thomas J. Flavin, Judicial Officer

Preliminary Statement

This is a proceeding under section 8c (15) (A) of the Agricultural Adjustment Act (1933) as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 and subsequent amendments (7 U.S.C. 601 et seq.), The petitioner is a handler under Order No. 14, as amended (7 CFR 914.1 et seq.), issued under the act and regulating the handling of Navel oranges grown in Arizona and a designated part of California.

Under the order, regulation or restriction of the volume of weekly shipments of Navel oranges is a means adopted for carrying out the statutory policy

Defendants' Exhibit B—(Continued)

of establishing and maintaining such orderly marketing conditions for oranges grown in the production area as will tend to establish parity prices for such oranges. An administrative committee, the Navel Orange Administrative Committee, recommends and the Secretary issues regulations, i.e., weekly prorate orders, limiting the quantity of Navel oranges which may be shipped during weekly periods from the production area. The production area is separated into prorate districts with the individual producing regions possessing similar marketing periods grouped into the same prorate district. Generally, oranges are marketed from the different prorate districts at different times with some competition between districts during part of the period of marketing. The order further provides a method for allotting the total quantity of the regulated commodity, Navel oranges, which may be handled during a specified period so that such quantity may be equitably apportioned among all the handlers thereof. (See decision of the Secretary which formed the basis for Order No. 14 (18 F.R. 4708).

Petitioner complains of the action of the Secretary in restricting shipments of Navel oranges from the Central California prorate district, District No. 1. It is alleged in the petition, in effect, that insufficient quantities of 1955-1956 Navel oranges from the Central California district were permitted to be shipped each week resulting in regulation of the handling of such oranges beyond their historical

Defendants' Exhibit B—(Continued)

life; and that such regulation was arbitrary, capricious and unreasonable, defeated the declared policy of the act and deprived petitioner of property without due process of law in violation of the Fifth Amendment of the Constitution. Discrimination against petitioner also is averred because the Navel orange crop from the Southern California prorate district was allegedly prorated over a substantially shorter period beyond its historical marketing season. The petition prays that the restrictions complained of be terminated and that shipping restrictions extending beyond the historical life of the crop be prevented in the future.

An answer to the petition was filed by the Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture, on May 9, 1956. Respondent, in the answer, denied the material allegations of the petition and upheld the contested regulation of the 1955-1956 Central California Navel orange crop as in accordance with law and the terms of Order No. 14, as amended. A hearing upon the petition was held before Glen J. Gifford, Hearing Examiner, Office of Hearing Examiners, United States Department of Agriculture, in Los Angeles, California, on June 14, 1956. At the hearing, petitioner was represented by G. V. Wекert, Attorney at Law, Los Angeles, California. The respondent was represented by John S. Griffin, Attorney, Office of the General Counsel, United States Department of Agriculture. After the hearing, the

Defendants' Exhibit B—(Continued)

parties filed briefs. On September 28, 1956, the hearing examiner issued a report containing proposed findings of fact and conclusions and recommending that the petition be dismissed. The petitioner filed exceptions to the examiner's report.

Findings of Facts

1. Petitioner, Lo Bue Bros., is a partnership composed of Mario, Fred, and Joseph Lo Bue, whose address is 201 Sweetbriar, Lindsay, California. The petitioner is a handler subject to regulation under Order No. 14, as amended, which regulates the handling of Navel oranges grown in Arizona and a designated part of California.

2. Up to January 1, 1956, 2,626 cars, or 26.8 per cent, of the 1955-1956 tree crop of Navel oranges produced in the Central California district had been handled in domestic fresh trade channels as compared to approximately 46 per cent of each of the 1953-1954 and 1954-1955 tree crops so handled prior to January 1, 1954, and 1955, respectively. The relatively small percentage of the 1955-1956 Central California tree crop of Navel oranges handled prior to January 1, 1956, resulted from the delayed maturity of the crop and adverse weather conditions and not from any regulations imposed under the order. Central California handlers and producers lost the opportunity of handling a total of approximately 2,000 carloads of Navel oranges during No-

Defendants' Exhibit B—(Continued)

vember, and December, 1955 due to maturity and weather conditions.

3. Since the inception of Order No. 14, regulation of the handling of Navel oranges grown in the Central California district and the shipment of such oranges were completed as follows:

	Regulation of handling	Completion of shipments
1953-1954	March 12, 1954	April 9, 1954
1954-1955	April 9, 1955	May 7, 1955
1955-1956	May 21, 1956	June 4, 1956*

*A small quantity of Navel oranges from the 1955-1956 crop was shipped after June 4, 1956.

4. During the seven marketing seasons beginning 1944-1945 and ending 1950-1951, all the Navel oranges produced in Central California were marketed by April 15 of each year. Later marketing of such oranges has been experienced in recent years (see Finding of Fact 3) and is to be expected in the future due to changed economic conditions which make it impossible to market as large a volume of Navel oranges produced in Central California each week as was marketed weekly in prior years. Competition from frozen orange concentrate, canned juice, the greatly expanded Florida orange crop, and other commodities has reduced the weekly demand for Central California Navel oranges.

5. From March 3 through June 2, 1956, Navel oranges produced in the Southern California district sold at a premium over Central California Navel oranges of from 13 cents to 94 cents per carton, the usual spread being approximately 25 cents per car-

Defendants' Exhibit B—(Continued)

ton. From March 3, through May 5, 1955, during the 1954-1955 marketing season, Navel oranges produced in Central California generally sold at a premium over Southern California Navel oranges.

6. The weekly average interstate f.o.b. prices received during April, and May, 1956, by Sunkist for Navel oranges grown in Central California are as follows:

April 7	\$1.87	May 5	\$2.22
April 14	1.75	May 12	2.45
April 21	1.95	May 19	2.59
April 28	2.29	May 26	2.55

7. The on-tree returns to producers of Central California Navel oranges during the 1955-1956 seasons were the highest in history, except for a year during World War II when oranges were sold under price regulations and the on-tree returns for 1955-1956 were equalled.

8. Since the inception of Order No. 14, regulation of the handling of Navel oranges grown in the Southern California district and the shipment of such oranges were completed as follows:

	Regulation of handling	Completion of shipment
1953-1954	May 7, 1954	May 28, 1954
1954-1955	May 7, 1955	June 25, 1955
1955-1956	May 21, 1956	Not completed at time of hearing

9. The respective percentages of the tree crop of Navel oranges produced in Central California and in Southern California handled in fresh fruit channels under the order are as follows:

Defendants' Exhibit B—(Continued)

	Central California	Southern California
1953-1954	82.89	70.97
1954-1955	83.69	71.29
1955-1956	85.06	79.82*

*Through June 3, 1956

10. From October, 1955, through January, 1956, four and sometimes five grower members from the Central California district served on the Navel Orange Administrative Committee as compared with one or two grower members from the Southern California district, except from the January 5, 1956, meeting of the committee when each of these districts was represented by three grower members. When Southern California Navel oranges came into the market in appreciable numbers, representation on the administrative committee from that area was increased at the expense of grower representation from Central California.

11. William Luther Woodall, petitioner's sales manager, attended the March 15, and 29, 1956, meetings of the Navel Orange Administrative Committee and suggested at each meeting that approximately three-fourths of all Navel oranges permitted to be shipped from Central and Southern California during the subsequent weeks be allotted to Central California handlers. Further, he stated to the committee that he intended to ship all his Navel oranges regardless of the action of the Navel Orange Administrative Committee and that he would find a way to do it.

12. The petition in this proceeding was mailed

Defendants' Exhibit B—(Continued)

from Los Angeles, California, on Thursday, April 5, 1956. It was received and filed by the Hearing Clerk, United States Department of Agriculture, Washington, D. C., on Monday, April 9, 1956.

13. During the weekly regulation period ending 12:01 a.m., April 8, 1956, petitioner handled at least 23,416 cartons of Navel oranges in excess of its allotment and during the weekly regulation period ending 12:01 a.m., April 15, 1956, petitioner shipped 8,848 cartons of Navel oranges in excess of its allotment.

14. On April 12, 1956, a temporary restraining order was issued in the United States District Court for the Southern District of California, Northern Division, enjoining petitioner from further violating the order. Petitioner consented to a permanent injunction, effective April 20, 1956, enjoining it from violating Order No. 14 and any regulation issued thereunder.

Conclusions

I.

Petitioner complains of the extended period during which the 1955-1956 Central California Navel orange crop was subject to volume regulation.¹ It is

¹This proceeding does not become moot because the crop year in question has passed and the contested weekly prorate orders have, by their own terms, expired. It was intended by section 8c (15) (A) of the act to give an aggrieved handler a "day in

Defendants' Exhibit B—(Continued)

contended, in effect, that insufficient quantities of such oranges were permitted to be shipped each week resulting in regulation of the handling of the crop beyond its historical life. Such action is characterized, in part, as being arbitrary, capricious, unreasonable and inequitable.

Some basic principles must be kept in mind when examining the validity or reasonableness of an order, a provision thereof, or a regulation issued thereunder. "The background and legislative history

court" before the Secretary in his quasi-judicial capacity. It is clear, however, that after the Secretary has issued a prorate order, the time for determining its validity in a section 8c (15)(A) proceeding may be wholly inadequate for any effective relief. Of course, an application for interim relief might be entertained. Moreover, unless the rights of the parties under the regulation here complained of are determined, the situation presented on the record may again arise without possible remedy. We think, in these circumstances, that even though we are without power to grant the specific relief prayed with respect to the 1955-1956 crop, our duty is to determine the questions presented. Judicial decision of important questions that are likely to recur should not be defeated by short-term orders, capable of repetition, yet evading review. *Southern Pacific Terminal Company v. Interstate Commerce Commission and Young*, 219 U. S. 498 (1911); *Eastern Airlines, Inc., v. Civil Aeronautics Board*, 185 F. 2d 426, 427 (D.C. Cir. 1950); *Gay Union Corporation, Inc., v. Wallace*, 112 F. 2d. 192 (D.C. Cir. 1940), cert. denied, 310 U.S. 647 (1940); *Boise City Irr. & Land Co. v. Clark*, 131 F. 415 (9th Cir. 1904).

Defendants' Exhibit B—(Continued)

of the Agricultural Marketing Agreement Act of 1937, as amended, leave no doubt that Congress gave the Secretary broad discretion in its administration." *Queensboro Farm Products, Inc., v. Wickard*, 137 F.2d 969, 977 (2d Cir. 1943). The "terms of the Order are largely matters of administrative discretion" and the technical details "are left to the Secretary and his aides." *Stark v. Wickard*, 321 U. S. 288, 310 (1944). The responsibility of selecting the means of achieving the statutory policy and the relationship between the remedy and policy are peculiarly matters for administrative competence. *American Power & Light Co. v. Securities and Exchange Commission*, 329 U.S. 90, 112 (1946); *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 605, 613-614 (1950). The test of reasonableness or substantive due process is a check upon such administrative discretion, and it may be stated roughly as an inquiry as to whether the means selected to achieve the statutory policy bear a reasonable and substantial relationship to the accomplishment of such policy and whether such means are arbitrary or capricious, *Nebbia v. New York*, 291 U.S. 502, 525, 537 (1934); *Lapides v. Clark*, 176 F. 2d 619 (D.C. Cir. 1949), cert. denied, 338 U. S. 860 (1949); *North American Company v. Securities & Exchange Commission*, 133 F. 2d 148 (2d Cir. 1943), aff'd, 327 U.S. 686 (1946); *In re Clover Leaf Dairy Company, et al.*, 15 A.D. 339 (1956).

Defendants' Exhibit B—(Continued)

Delayed maturity of the 1955-1956 Central California Navel orange crop and adverse weather conditions during the months of November, and December, 1955, prevented part of the crop from being marketed prior to January 1, 1956. Only 26.8 per cent of the 1955-1956 Central California crop was marketed prior to January 1, 1956, as compared to approximately 46 per cent of the crop marketed prior to January 1 of each of the two preceding crop years. In earlier seasons greater percentages, reaching as high as 81.55 per cent with respect to the 1945-1946 crop, were marketed prior to January 1. Central California lost the opportunity of handling approximately 2,000 carloads of Navel oranges during the months of November, and December, 1955, due to adverse weather conditions and late maturity of the crop. Thus, the Secretary was faced with the problem of regulating, with the aid of the Navel Orange Administrative Committee, the marketing after January 1, 1956, of an additional 2,000 carloads of oranges which would ordinarily have been sold. Coupled with this situation were changed economic conditions which made it impossible to market or handle as large a volume of Navel oranges each week as were marketed weekly prior to the promulgation of Order No. 14. Competition from frozen orange concentrate, canned juice, the greatly expanded Florida orange crop, and other commodities reduced the weekly demand for California Navel oranges. The Secretary had

Defendants' Exhibit B—(Continued)

the alternative of extending the shipping season for such oranges or permitting the shipment of excessive quantities into the market, that is, the marketing of Central California Navel oranges in keeping with past marketing history without regard to changing economic conditions. The shipment of excessive quantities of Navel oranges has always brought lower returns to the grower. While the regulated marketing of the 1955-1956 Central California Navel orange crop was completed later than in previous years, the record does not indicate that the contested volume regulation of the crop by the Secretary was arbitrary or unreasonable, especially in view of weather and maturity conditions and the decreased weekly demand for California Navel oranges. It must be concluded that the restriction of the handling of the crop in question was reasonable, appropriate to a permissible end and reflected the particular conditions prevailing in the area. Petitioner's allegation that the late marketing of the 1955-1956 crop caused a deterioration thereof has not been established. On the contrary, the evidence indicates that excellent returns were received for this crop in the later months and that any premium for Southern California Navel oranges over Central California Navel oranges was unrelated to late marketings during the months of April, and May, 1956.

Petitioner further avers that the declared purpose of the act was defeated by the contested treat-

Defendants' Exhibit B—(Continued)

ment of the crop in issue. The purpose of the weekly prorate orders clearly falls within the statutory policy of the act² and the record indicates that rather than defeat such purpose, the restrictions imposed were instrumental in attaining excellent returns to growers for the 1955-1956 crop.

II.

Discrimination against petitioner is charged because the Southern California Navel orange crop was allegedly prorated over a substantially shorter period beyond its historical marketing season than was the 1955-1956 Central California Navel orange crop. In effect, petitioner is contending that Central California handlers should have been allowed to handle more of their crop before Southern California handlers were permitted to ship as they did. The fact that a particular regulation "may demonstrably be disadvantageous to certain areas or persons" is not enough to constitute a violation of the due process clause. *Secretary of Agriculture v. Central Roig Refining Co.*, supra at 617-619; *In re Central Dairy Products Company*, 12 A.D. 303, 312 (1953), and cases cited therein. Moreover, pe-

²Section 2(1) of the act (7 U.S.C. 602 (1)) declares it to be the policy of the act, in part, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as would establish parity prices to the growers thereof. See also *In re Beatrice Foods Co. et al.*, 15 A.D. 767 (1956); *In re Terrace Park Dairy et al.*, 12 A.D. 1383, 1393 (1953).

Defendants' Exhibit B—(Continued)

petitioner has not established herein that the disputed regulation of the Central and Southern California Navel orange crops was disadvantageous to it or to the Central California area generally and has failed to sustain its burden of proof of discrimination by other than remote or fanciful evidence. See *Wawa Dairy Farms, Inc., v. Wickard*, 56 F. Supp. 67 (E.D. Pa. 1944), *aff'd*, 149 F.2d 870 (3d Cir. 1945); *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 567-568 (1939); *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185 (1935). Indeed, we find no evidence of discrimination against petitioner in the record. Petitioner's contention that the regulation of the marketing of the 1955-1956 California Navel orange crop favored shippers from Southern California is unsupported by evidence. During the past ten regulated crop years producers and handlers from Central California have always marketed a substantially larger part of their crop in regulated fresh market outlets than have the handlers and shippers in Southern California. In fact, petitioner marketed almost five per cent more of its 1955-1956 crop in fresh fruit channels than the average marketed by handlers and producers from Southern California this past marketing season.³ In addition, any price differential between Southern and Central California Navel oranges

³Moreover, petitioner marketed 0.69 per cent more of its 1955-1956 Navel orange crop in fresh market channels than the average marketed by handlers in Central California.

Defendants' Exhibit B—(Continued)

appears to have resulted from the characteristics of the two crops rather than the time of marketing of the respective crops.

In the absence of any proof or finding of discrimination, petitioner's argument that Central California did not have fair or adequate representation on the Navel Orange Administrative Committee at the time of the alleged discrimination is of no validity or effect. In any event, representation on the committee from the Central California area during the 1955-1956 season does not appear to us to be unreasonable or inequitable. From October 1955 through January 1956, four and sometimes five grower members from Central California served on the administrative committee as compared with one or two grower members from Southern California. This was the period when Central California Navel oranges were being shipped in greatest volume. When Southern California Navel oranges came into the market in appreciable numbers, representation on the committee from that area was increased at the expense of Central California's grower representation thereon. We do not consider such action to be unfair or inequitable.

III.

We come to the question as to whether the petition was filed in good faith or for delay or immunity from prosecution under section 8c(14) of the act (7 U.S.C. 608c(14)). The fruit and vegetable programs

Defendants' Exhibit B—(Continued)

under the act are seasonable in nature and involve mainly restrictions upon shipments or sales. Since immunity from fines is provided by section 8c(14) for violations of an order issued under the act during the pendency of a section 8c (15) (A) petition filed and prosecuted in good faith, there is afforded an opportunity for handlers to defeat the order by unregulated shipments by the mere expedient of filing a petition since the shipping season is over before final decision can be had upon the petition.⁴ In some instances in the past, the filing of the petition has been a subterfuge. See *In re J. G. Bryson*, 1 A.D. 301 (1942).

The record in this proceeding contains some evidence of lack of good faith. (See Findings of Fact, 11, 12, and 13.) However, since we are dismissing the petition upon the merits, we do not feel it necessary also to conclude that the petition should be dismissed for lack of good faith and, therefore, no finding or conclusion is made on this part of the case insofar as this proceeding is concerned. Cf. *In re Kroells Packing Company*, 10 A.D. 774 (1951).

In conclusion, the regulation under Order No. 14,

⁴Of course, an action pursuant to section 8a(6) of the act (7 U.S.C. 608 a(6)) is available to enjoin a handler from violating an order issued under the act and a temporary restraining order and injunction were entered against the petitioner herein in the United States District Court for the Southern District of California.

Defendants' Exhibit B—(Continued)

as amended, of the handling of the 1955-1956 Central California Navel orange crop complained of by petitioner is in accordance with law and the petition should be dismissed.

All contentions of the parties presented for the record have been considered and whether or not specifically mentioned herein, any suggestions, requests, etc., inconsistent with this decision are denied.⁵

Order

In view of the foregoing, the relief requested by the petitioner is denied and the petition is dismissed.

(No. 4880)

In re Florida Fresh-Up Daily Juices, Inc. AMA
Docket No. 33-2. Decided December 26, 1956.

Application to Dismiss Petition—Adequacy of
Petition—Dismissal

The factual statements contained in the petition are sufficient to permit respondent to file an answer thereto.

⁵In answer to the statement of the counsel for petitioner that to his knowledge no 8c (15)(A) petition has ever been granted, we need only refer him to a few of the instances where the petitioner was successful in such a proceeding. See e.g., In re Walgreen Co., 14 A.D. 541 (1955); In re Queensboro Farm Products, 13 A.D. 589 (1954); In re Ideal Farms Dairy Products, Inc., et al., 8 A.D. 1119 (1949).

Defendants' Exhibit B—(Continued)

Hamilton, Stephenson and Straughn, of Winter Haven, Florida, for petitioner. Mr. Harry Platinik, for Agricultural Marketing Service.

Decision by Thomas J. Flavin, Judicial Officer.

Received in evidence March 11, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court hereby certify the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above matter.

A. The foregoing pages numbered 1 to 214, inclusive, containing the original:

Complaint.

Answer.

Minute Order 9/16/57.

Stipulation of Facts and Issues.

Minute Order 10/21/57.

Supplemental Stipulation of Facts; and Additional Issue.

Application for Leave to File Motion for Summary Judgment and Order thereon, etc.

Minute Order 11/15/57.

Defendant's Statement and Brief in Opposition to Motion for Summary Judgment.

Order on Motion for Summary Judgment.

Minute Order 12/30/57.

Notice of Motion and Motion to Compel Testimony, etc.

Minute Order 2/24/58.

Order on Motion to Compel Testimony.

Trial Memorandum.

Supplemental Trial Memorandum.

Minute Order 3/11/58.

Minute Order 3/12/58.

Motion for Leave to Submit Second Supplemental Trial Memorandum, etc.

Memorandum of Decision.

Objections to Findings.

Defendant's Proposed Findings of Fact, and Conclusions of Law, and Judgment.

Motion for Reconsideration and Clarification of Decision.

Order Settling Findings of Fact, and Conclusions of Law, etc.

Findings of Fact, Conclusions of Law and Judgment.

Notice of Appeal.

Designation of Record on Appeal.

B. Plaintiff's Exhibits:

#1—(Paragraphs 13 thru 16 of Stipulation of Facts and Issues.)

#2—(Paragraphs 17 thru 22 of Stipulation of Facts and Issues.)

#3—(Paragraphs 1, 2, 3, 4, 5, 6 & 7 of Supplemental Stipulation of Facts and Issues.)

#4—(Paragraph 8 of Supplemental Stipulation of Facts and Issue.)

#5—(Manuscript, pages 1 thru 140 U. S. Dept. of Agriculture—June 14, 1956.)

#6—(Exhibits Marked 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 of Domestic Fresh Shipments.)

#7—(Four Pages of Certificate of Presiding Officer Docket No. AMA No. 14-1.)

Defendant's Exhibits:

A—(Paragraphs 13 thru 16 of Stipulation of Facts and Issues.)

B—(Pamphlet—U. S. Dept. of Agriculture—Agriculture Decisions.)

C. One volume of Reporter's Transcript of Proceedings had on: March 11 and 12, 1958.

D. Deposition of Mrs. Kay Bottomley, Dorothy DePew, G. A. Wallenman, William Luther Woodall, James H. Woodall, Mario Lo Bue, Fred Lo Bue.

E. Continuation of Depositions of: Mario Lo Bue, William Luther Woodall, G. A. Wallenman.

I further certify that my fee for preparing the foregoing record, amounting to \$2.40, has not been paid by appellant.

Dated: October 24, 1958.

JOHN A. CHILDRESS,
Clerk.

[Seal] By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16230. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Lo Bue Brothers, a partnership, Mario Lo Bue, Fred Lo Bue and Joseph Lo Bue, partners and William Luther Woodall, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed and docketed: October 27, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

[Undocketed]

UNITED STATES of AMERICA,

Plaintiff-Appellant,

vs.

LO BUE BROTHERS, a Partnership; MARIO LO
BUE, FRED LO BUE and JOSEPH LO
BUE, Partners; and WILLIAM LUTHER
WOODALL,

Defendants-Appelles.

STATEMENT OF POINTS ON APPEAL

In accordance with the requirements of Rule 17(6) of the Rules of the United States Court of Appeals for the Ninth Circuit, the Plaintiff, i.e., Appellant, hereby submits and files the following statement of points on which the Plaintiff-Appellant intends to rely:

1. The District Court erred in finding and concluding that the Defendants', i.e., Appellees', shipments of Navel oranges in excess of the relevant quotas or allotments under the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 601 et seq.) were not "willful" within the meaning of § 8a(5) of the Act (7 U.S.C. 1952 ed., § 608a(5)).

2. The shipments of Navel oranges by the Defendants, i.e., Appellees, in excess of the relevant

quotas or allotments pursuant to the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 601 et seq.) were not accidental, involuntary, or unintentional—that is to say, the Defendants knowingly and intentionally made the excess shipments of Navel oranges involved in this case—and accordingly the District Court erred in finding and concluding that the excess shipments of Navel oranges by the Defendants were not “willfully” made within the meaning of § 8a(5) of the Act (7 U.S.C. 1952 ed., § 608a(5)).

3. The petition filed by the Defendants, i.e., appellees, under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 608c(15) (A)) was not filed in the United States Department of Agriculture until after the Defendants’ shipments of Navel oranges in excess of the relevant quotas or allotments pursuant to the Act, and accordingly the District Court erred in finding and concluding that the excess shipments of Navel oranges, involved in this suit, by the Defendants were not “willfully” made within the meaning of § 8a(5) of the Act (7 U.S.C. 1952 ed., § 608a(5)).

4. The Defendants, i.e., Appellees, relied on an erroneous opinion to the effect that their petition under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 608c (15)(A)) had been filed in the United States Department of Agriculture, and accordingly the

District Court erred in finding and concluding that because the Defendants relied on such opinion—and subsequently shipped Navel oranges in excess of the relevant quotas or allotments under the Act—the Defendants' shipments of Navel oranges in excess of the relevant quotas or allotments under the Act were not "willfull" within the meaning of § 8a(5) of the Act (7 U.S.C. 1952 ed. § 608a(5)).

5. The Defendants, i.e., Appellees, did not file and prosecute their petition under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 608c(15)(A)) in good faith and not for delay, and accordingly the District Court erred in finding and concluding that the excess shipments of Navel oranges, involved in this suit, by the defendants were not "willfully" made within the meaning of § 8a(5) of the Act (7 U.S.C. 1952 ed. §608a(5)).

6. The filing of a petition under § 8c(15)(A) of the Act (7 U.S.C. 1952 ed. § 608c(15)(A))—either before or after the shipments of Navel oranges by the Defendants, i.e., Appellees, in excess of the relevant quotas or allotments under the Agricultural Marketing Agreement Act of 1937—does not, as a matter of law, exempt the Defendants from liability under the provisions of § 8a(5) of the Act (7 U.S.C. 1952 ed. § 608a(5)) in this case, and accordingly the District Court erred in finding and concluding that, because the Defendants relied on legal advice to the effect that the filing of a petition

under § 8c(15)(A), if filed in good faith, would exempt them from such liability, the shipments of Navel oranges in excess of the relevant quotas or allotments under the Act were not “willfully” made within the meaning of § 8a(5) of the Act.

7. The Defendants, i.e., Appellees, relied on erroneous legal advice in making their shipments of Navel oranges in excess of the relevant quotas or allotments under the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 601 et seq.), and accordingly the District Court erred in finding and concluding that because the Defendants relied in good faith on such legal advice, the Defendants’ excess shipments of Navel oranges were not “willfully” made so as to subject the defendants to liability pursuant to § 8a(5) of the Act (7 U.S.C. 1952 ed. § 608a(5)).

8. The District Court erred in finding and concluding that—in view of its findings and conclusions that the Defendants, i.e., Appellees, accepted, believed, and relied in good faith on the advice given to them by a reputable attorney to the effect that the filing of a petition, in good faith, by the Defendants pursuant to § 8c(15)(A) of the Act (7 U.S.C. 1952 ed. § 608c(15) (A)) would, as a matter of law, exempt the Defendants from liability for penalties under the Act with respect to shipments during the period from the filing of such petition to the decision thereon by the administrative agency, unless shipments were enjoined by a District Court,

and that the Defendants accepted, believed, and relied in good faith on such advice given to them by the attorney and filed or undertook to file such a petition under § 8c(15)(A) of the Act—the Defendants' shipments of Navel oranges in excess of the relevant quotas or allotments under the Act were not "willful" within the meaning of § 8a(5) of the Act (7 U.S.C. 1952 ed. § 608a(5)).

9. The findings and conclusions by the District Court that the shipments of Navel oranges by the Defendants, i.e., Appellees, in excess of the relevant quotas or allotments pursuant to the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 601 et seq.) were not "willfully" made within the meaning of § 8a(5) of the Act are, on the basis of the record in the case, clearly erroneous.

10. The findings and conclusion by the District Court that the defendants, i.e., appellees, accepted and believed the advice of a reputable attorney and acted in good faith in reliance thereon in making the shipments of Navel oranges in excess of the relevant quotas or allotments pursuant to the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 1952 ed. § 601 et seq.) and in so doing exercised ordinary and reasonable care and caution and did not knowingly, intentionally, or wilfully exceed the relevant quotas or allotments are, on the basis of the record in the case, clearly erroneous.

11. The District Court erred in failing to find, conclude, and enter judgment to the effect that the

shipments of Navel oranges by the defendants, i.e., appellees, in excess of the relevant quotas or allotments pursuant to the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 1952 ed. § 601 et seq.) were “wilfully” made within the meaning of § 8a(5) of the Act (7 U.S.C., 1952 ed. § 608a(5)), and that the defendants are liable under the terms of § 8a(5) of the Act.

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[Endorsed]: Filed October 28, 1958.

IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 16230

UNITED STATES OF AMERICA, *Plaintiff-Appellant*

v.

LoBUE BROS., ET AL., *Defendants-Appellees*

On Appeal From the United States District Court for the Southern
District of California

**BRIEF FOR SUNKIST GROWERS, INC.,
AMICUS CURIAE**

FILED

MAY 15 1959

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**BRIEF FOR SUNKIST GROWERS, INC.,
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PRELIMINARY STATEMENT

This brief is filed pursuant to paragraph 9(a) of Rule 18, by Sunkist Growers, Inc. (hereinafter referred to as "Sunkist"), a cooperative marketing association engaged in marketing citrus fruits grown in California and Arizona. Sunkist conducted such marketing operations in 1956 on behalf of some 12,000 growers who marketed their fruits through some 140 local associations. Of these local associations, which were affiliated with Sunkist, 92 packed and shipped naval oranges in the 1955-56 season. Each such local was a "handler" of navel oranges and each was subject to the same regulations and requirements under the

terms of the marketing order as were applicable to LoBue Bros. against whom this proceeding was instituted for violation of the marketing order by reason of shipments in excess of the quota or allotment established for that shipper for the two weeks beginning April 1 and 8, 1956.

This brief is submitted in support of the Government position that defendants violated the order and that the statutory sanction for such violation should be imposed. To avoid undue repetition this brief will adopt the statement of facts, the specification of errors and the argument in the brief presented by the United States. It will be the purpose of this brief to point out that Congress intended that there be an effective means of enforcement to preserve the benefits marketing orders provide for growers and that the severity of the sanction is appropriate to the gravity of the offense. Such discussion will include a brief review of the statute, a consideration of the regulatory provisions of the particular Marketing Order here involved and the effects upon other handlers in the industry, as well as upon navel growers generally, of non-compliance on the part of any one handler, such as the defendants herein. Finally, it was not contemplated nor should it be permitted that a handler escape the consequences of violation of the Order by any procedural maneuver such as was resorted to in this case.

THE STATUTE

The Agricultural Marketing Agreement Act of 1937 (50 Stat. 246; 7 USC 601ff) was a reenactment and amendment of certain provisions of Title 1 of the Agricultural Adjustment Act (1933) (48 Stat. 31) as same had been amended by the Act of August 24, 1935 (49 Stat. 750). The legislative action in 1937 was prompted by the fact that certain provisions of the Agricultural Adjustment Act (not relating to marketing agreements) had been held invalid. *United States v. Butler*, 297 U.S. 1.

Such statute, with subsequent amendments, provides for the issuance of marketing orders with respect to specified commodities (including navel oranges) under which several types of volume or quality regulation (or both) may be imposed with the general objective of improving grower returns, subject to the limitation that certain regulations must be discontinued when prices exceed parity. The act constitutes an exercise of the Congressional power to regulate commerce (See Sections 1 and 2; 7 USC 601, 602) and has been upheld as a valid exercise of that power. *United States v. Rock Royal Cooperative*, 307 US 533, 568-71; *United States v. Wrightwood Dairy Co.*, 315 US 110, 119-126. The conclusions announced by the Supreme Court in the two cases just cited had been reached at an earlier date by this Court in *Edwards v. United States*, 91 Fed. 2nd, 767, 777-78, 782-783.

Of the several types of regulation authorized by the act, that employed in the marketing order here under consideration was a limitation of shipments by weekly periods. In this manner supplies offered for sale were matched with the demand. Those engaged in the production and marketing of perishable commodities had become aware of the improvement in income or returns to the growers that resulted when supplies were reduced by natural causes such as a freeze or drought. It had been observed that the shorter crop, commanding a higher unit market price, yielded a greater return to the growers than excessive supplies which had to be sold for lower unit prices. The limitation of shipments authorized by the Marketing Agreements Act is a statutory tailoring of supplies to demand in a manner that will equitably distribute the burden of elimination among all handlers and their respective growers.

Commenting on the original marketing order provisions of the Agricultural Adjustment Act shortly after the first year's experience under that statute, H. R. Wellman, now

Vice President of the University of California at Berkeley, California, said in an address at the 25th Annual Meeting of the American Farm Economic Association on December 28, 1934:

“Restoration of the purchasing power of producers of fruits and vegetables through the establishment and maintenance of the balance between the supplies and consumption of these products is sought to be achieved under the agricultural adjustment act by means of marketing agreements. * * *

* * * * *

“Limitation of the total volume marketed during the entire season is based on the expectation that the total return to growers will be larger for the limited volume than would be the case if all of the available supply were marketed. Under conditions of inelastic consumer demand or of high marketing charges limitation of the total supply marketed during years of large crops relative to consumers' incomes is an effective means of increasing growers' returns.” (Journal of Farm Economics, Vol. XVII, pp. 349, 351).

This Court in its decision of July 22, 1937, considering an earlier marketing order on oranges, commented as follows:

“The regulated flow to market of oranges, in accordance with the provisions of the Act as applied by the order, tends to (1) a reasonably constant, dependable supply at the terminal markets by the avoidance of alternate gluts and famines, (2) a ready disposition of the fruit at terminal markets without expense and deterioration consequent upon holding, (3) a more accurate anticipation by railroads of the probable transportation requirements of the citrus industry, and (4) a more efficient conduct of railroad operations respecting the availability and flow of refrigerator cars, thereby promoting the confidence of dealers, increased market stabilization, higher standards of trade, protection to growers, handlers and consumers, and increased consumptive demand

respecting such fruit.” *Edwards v. United States*, 91 Fed. 2nd 767, 777.

In the same decision, at page 776, this Court commented in some detail upon the importance of the citrus industry.

Three methods of enforcement of marketing orders are provided by the statute:

- (1) Forfeiture of three times the value of the excess over any quota or allotment, (Sec. 8a(5); 7 USC 608a(5));
- (2) Injunction in a suit brought by the United States District Attorney, at the request of the Department of Agriculture, (Sec. 8a(6) and (7); 7 USC 608a(6) and (7));
- (3) Criminal prosecution (Sec. 8c(14); 7 USC 608c(14)).

With respect to the third method above listed, a proviso in Sec. 8c(14) forbade imposition of a penalty “under this subsection” for violation by a handler who had filed a petition with the Secretary of Agriculture for modification of or exemption from the order, pursuant to Sec. 8c(15) A of the Act.

The method of enforcement here employed was the first above listed. Section 8a which authorized both the first and second methods of enforcement contained the additional provision:

“The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity.” (Sec. 8a(8)).

THE MARKETING ORDER

The particular marketing order here involved is Marketing Order No. 14, as amended, regulating the handling of navel oranges grown in Arizona and designated part of

California, (hereinafter referred to as the "navel orange order", or "the order", effective September 22, 1953 and in effect since that date. (R. 20; 7 CFR 914). Such order was the latest of a series of marketing orders which had been in effect during most of the time since the original enactment of the Agricultural Adjustment Act of 1933. The order provided for the limitation of the quantity of oranges which may be handled during a specified week (Sec. 914.52). Provision was made for the establishment of a prorate base for each person who had oranges available for current shipment (Sec. 914.53). The allotment to each such person represented such person's share of the total weekly shipments authorized and was computed by multiplying the authorized weekly shipment by the prorate base, the latter expressed in terms of a percentage. (Sec. 914.54).

The promulgation of the navel orange order was accompanied by a decision issued by the Secretary of Agriculture (18 FR 4708). The Order was amended effective August 1, 1954, and the decision with respect to such amendments was published in 19 FR 2941. The order as thus amended was in effect at the time the excess shipments were made by LoBue Bros. in April, 1956.

The findings and conclusions set forth in the Secretary's decision portray the purposes and objectives of the order and demonstrate the importance of the order to the citrus industry. The following quotations are particularly pertinent to the situation presented in the present case:

"During the California-Arizona navel orange shipping season, there are sharp fluctuations in the demand for such oranges. These oranges have been associated with the Christmas holiday season and, prior to Christmas there is a sharp increase in consumer demand for such oranges. Following Christmas, this demand drops rapidly and thereafter increases gradually until the end of the shipping season. From week to week, however, changes in prices received and quantities sold reveal fluctuations in demand caused by the factors

affecting the level of demand for California-Arizona navel oranges.

“The primary problem to which the proposed marketing agreement and order is addressed is that of correlating the quantity of oranges to be shipped each week with the changes in demand for such oranges. The question is whether the weekly shipments can be adjusted to changes in demand conditions more effectively when they are regulated by means of a marketing agreement and order program than when they are not so regulated. The marketing agreement and order is not proposed as a device to be used primarily for the purpose of reducing the total quantity of oranges shipped to fresh markets, except as a result of limitations of sizes so shipped. Rather, it is proposed as a device for adjusting the rate of shipping the available supplies so as to coordinate the flow of shipments with the market demands for such oranges, and thus to tend to achieve the declared policy of the act.

“Oranges may be stored on the tree after reaching maturity. When the crop of oranges in a particular producing district has reached maturity, all the fruit is capable of being shipped. Producers, moreover, are anxious to harvest their fruit in order to avoid possible loss from frost or from drop or deterioration in grade. As a consequence, producers exert strong pressures upon handlers to ship their fruit. It is extremely difficult for operators of packinghouses to ignore such pressures and to ship such oranges in response to the then current demand.

“The authority to regulate shipments each week under a marketing program provides a means to withstand such pressures to ship and thereby to adjust the quantity of fruit shipped to that required in marketing channels. In addition, the proposed marketing agreement and order makes readily available to handlers knowledge of the quantity which is to be shipped each week, as well as more accurate knowledge of the quantity of fruit available in and enroute to consumer markets. Moreover,

receivers of California-Arizona navel oranges would be provided with a basis for maintaining their commercial operations in the light of information with respect to the rate at which supplies will be made available to them.

“Such conditions do not exist in the absence of a marketing agreement and order, and the evidence indicates that there exists a tendency on the part of handlers, in the absence of some program providing restraint of shipments, to ship excessive quantities because of desires of producers to pick their fruit and thereby avoid losses through damage or deterioration in the groves. Moreover no individual handler or group of handlers successfully can increase the level of prices by reducing shipments because other handlers can nullify such action by increasing their shipments accordingly.

“Therefore, it is concluded that a marketing agreement and order is needed to effectuate the declared policy of the act by establishing orderly marketing conditions for navel oranges grown in the production area through providing a means of limiting the quantity of such oranges that may be shipped each week to commercial fresh channels.” (18 FR 4708, 4710).

Under the navel order the area of production was divided into four prorate districts; the shipments here involved were from prorate district No. 1, commonly referred to as Central California. (R 20-21; 80-81). The pressures upon handlers to ship fruit were particularly acute in Central California in April as that was approaching the end of the shipping season for that area. (R 106, 141, 147-148, 161-164). Obviously the same pressures were being felt by all other handlers operating in the Central California area.

With respect to the order provisions relating to allotments and the preservation of equities among handlers, the Secretary's decision made the following findings:

“The Act requires, in effect, that a program of this nature should provide a method for allotting the total

quantity of the regulated commodity which may be handled during a specified period so that such quantity may be equitably apportioned among all of the handlers thereof. Under the provisions of the proposed marketing agreement and order, this requirement means that each handler should be given the same opportunity to market oranges under volume regulation as each other handler in the same prorate district. The equality of opportunity to market oranges should exist among handlers within a particular prorate district, because the market opportunities vary as between prorate districts as the result of the different timing of maturity and shipping life of the oranges in each prorate district.

“The act also requires that such equitable apportionment should be on the basis of the quantity of the regulated commodity which each handler has available for current shipment, or upon the quantity of such commodity shipped by each such handler in such prior period as the Secretary determines to be representative, or both. Under this program, an individual handler’s equity or share of the limited quantity which may be shipped from a particular prorate district in any week should be based upon the quantity of oranges currently controlled by such handler. Testimony at the hearing indicated that the percentage of the oranges controlled and handled varies between handlers from year to year. Therefore, the determination of an individual handler’s share on the basis of past performance, or a combination of past performance and current control, would not truly reflect the current status of each handler in relation to all others. Furthermore, the use of the quantity of oranges currently under control as a basis for determining individual handler’s equities is practical under this program as it is possible to determine with precision the quantity of oranges currently controlled by each handler.

“The equity of each handler in the total quantity which may be handled in a prorate district during any week should be expressed as his prorate base. A prorate base is the ratio between the total quantity of oranges available for current shipment of the

particular handler and the total quantity of oranges available for current shipment of all such handlers in the particular prorate district. Thus each handler's share of the limited quantity which may be shipped from a given prorate district each week under volume regulation is the same percentage as his share of the total quantity of oranges available for current shipment in such prorate district." (18 FR 4708, 4715)

Fresh shipments of California-Arizona navel oranges in the 1955-56 crop year (November 1-October 31) were 27 million cartons; this was substantially the same as the annual volume of the preceding two years—25 million in 1953-54 and 26.4 million in 1955-56. (USDA Citrus Fruits, Production and Utilization Series). In the first two weeks of April of that year, the quantity of shipments permitted from prorate district No. 1 was 277,200 cartons for the first week and 231,000 cartons for the second. (R 22-23; 81-82). Of these amounts defendants, LoBue Bros., were allotted, on their prorate base, 10,428 cartons and 8,702 cartons, respectively. After allowing for appropriate adjustments defendants' overshipments were 23,416 cartons for the first week and 8,848 cartons for the second week. The complaint is limited to the overshipments of the first week and those of the second week made prior to the date of filing the 15 A petition, April 9; such overshipments in the second week were 2,933 cartons. (R 22-24; 81-84). Permissible shipments for the same periods from prorate district No. 2, comprising Southern California, were 970,200 cartons for the first week and 693,000 cartons for the second week. (21 FR 2037; 2267).

The overshipments of 23,416 cartons for the first week and 2,933 cartons for the second week (prior to April 9) were made in 26 separate shipments, 23 of which were made on Saturday, April 7, and the remaining 3 in the early morning hours of Sunday, April 8. (R 33-34; 108-110).

EFFECTS OF NON-COMPLIANCE

For the crop year 1955-56, of which April, 1956, was a part, the average on tree price for California-Arizona navel oranges utilized in fresh shipments was \$1.50 per carton; those utilized in processing, the principal outlet for oranges in excess of those which can be shipped fresh, returned only 3.5 cents per carton. (USDA, AMS, Agricultural Prices). Because of this very large difference in return on fresh shipments compared with processing, a shipper or grower who succeeded in obtaining a share of the fresh shipments available under the marketing order, larger than his fair share, gained a substantial advantage over his competitor or neighbor. To the extent that LoBue's overshipments on the week-end of April 7-8 permitted the shipment in fresh form of a greater quantity for the season than would have been possible had the requirements of the order been observed, LoBue Bros. and growers whose fruit was so shipped received well over \$1.00 per carton more than they were entitled to receive.

Such a preference and advantage through non-compliance with the order is possible only because all other handlers and their growers continued to observe the requirements of the Order.

Had all handlers overshipped their allotments to the same extent that LoBue Bros. did in these two weeks, over 5 million cartons of California-Arizona navel oranges would have been shipped during these two weeks in April instead of the permissible maximum of 2,171,400 cartons. Under the impact of any such shipments, prices would have plunged to such distressingly low levels that there might have been no return above the transportation costs.

Of course no such fantastic violations of the Order by all shippers would ever occur. Even without regulation, shippers would not overload the market to such an extent.

However, since it is well established that any substantial volume in excess of current market demand causes an immediate reduction in price, it must follow that any over-shipments, no matter how slight, tend in the direction of reducing the price for all. It is obvious from the sharp reduction in the quantity of permitted shipments in the second week compared with the first week (924,000 cartons from both districts compared with 1,247,400 in the first week) that there was a weakening of market price in this period. Otherwise, the prorate would not have been so sharply reduced.

This obvious inference is confirmed by the decline in the average weekly price for Central California navels received by Sunkist; for the week ending April 15, 1956, such price was 12 cents per carton less than that of the preceding week and 20 cents less than that of the succeeding week (R 337). In that week the total authorized shipments were 1,201,200 cartons (21 FR 2429, 2650). The price rise in the week succeeding April 15 was unquestionably due to the curtailment of the weekly prorate for the week of April 8-15. This illustrates the sensitivity of the market in responding to volume changes.

The overshipments included in the complaint occurred within a period beginning Saturday, April 7 and ending in the early morning hours of Sunday, April 8; 23 shipments were made on Saturday and 3 in the early morning hours of Sunday. The additional overshipments were completed in the next two days. Two cars were sold promptly; the others were all offered for sale through LoBue's brokers. (R 110-111). By reason of such offers for sale while "rolling" their impact upon the market was immediate. The total overshipments of 32,264 cartons may, therefore, appropriately be compared to a single week's prorate. They represent approximately 12% of the allowable shipments from district No. 1 for the first week

in April. They were 2.5% of the total allowable shipments of all California-Arizona navels for that week.

It would be difficult, if not impossible, to demonstrate mathematically what part LoBue's overshipments contributed to the price weakness which was present in the market in the second week of April as above noted. But if the decline in price amounted to only 10 cents per carton the loss or damage to all shippers on the total shipments of the first two weeks in April would amount to \$217,140.00. Compared with such a loss to the navel shippers and growers as a whole, the amount for which recovery is sought for the non-compliance by LoBue Bros., namely, three times \$49,870.74 (the value of the overshipments) is not unreasonable.

An even more serious result of unpunished non-compliance with a marketing order such as this one, is the threat of collapse of the order. As soon as it is learned that one handler who avoids the order can retain all the benefits of such non-compliance, other handlers will inevitably join in like non-compliance and the whole order will break down for lack of effective enforcement.

Such a result would have most serious consequences to the financial returns to growers. Here again it is difficult to measure mathematically the price effect of a Marketing Order. However, some measure of the possible financial consequences of abandonment of the existing navel orange order may be had by comparing price results in a year when there was no regulation with other years in which marketing order regulation prevailed.

Immediately preceding the present navel orange order which became effective September 22, 1953, there had been no marketing order regulation of California-Arizona navels since March 8, 1952, when the previous marketing order (which covered both navels and valencias) had been terminated. So in the 1952-53 season navel oranges were

without marketing order regulation. In 1952-53, with shipments equivalent to 30.3 million cartons, the average on tree price was 89 cents per carton. In the succeeding three years, under marketing order regulation, shipments and prices were respectively 24.7 million at \$1.24 per carton, 26.5 million at \$1.23 per carton and 27 million at \$1.50. (USDA Citrus Fruits, Production and Utilization Series) The total on-tree returns for the smaller volume shipped under marketing order regulation all exceeded the return on the greater volume shipped without regulation, the comparisons in round numbers, being as follows:

1952-53	\$27 million
1953-54	30.5 million
1954-55	32 million
1955-56	40 million

While other factors undoubtedly account for parts of these differences, it should be reasonably clear that the marketing order regulation adds substantial sums to the annual returns to navel growers and that discontinuance of the present navel marketing order would cause the growers to lose several million dollars annually. Compared with such a loss, the amount sought to be recovered in this case for a non-compliance which, if unpunished, might result in collapse of the order, is relatively small.

A further serious consequence of lack of effective enforcement with respect to the navel marketing order is the effect upon other marketing orders. Non-compliance is contagious and, if unchecked, tends to spread to other like orders. With respect to citrus fruits alone there are three other marketing orders presently in effect, one on valencia oranges, one on lemons and one on grapefruit (7 CFR, Parts 922, 953 and 955). If it is established that non-compliance with the navel orange order can be practiced with impunity, like non-compliance would surely spread to the valencia orange order and might well lead to like results with respect to the lemon and grapefruit

orders, as well as other marketing orders applicable to other commodities produced in the California-Arizona area. These collateral effects may easily become so serious as to adversely affect the whole agricultural economy of the West Coast area.

In the *Edwards* case dealing with an earlier orange marketing order and involving overshipments of a lesser quantity than those of LoBue Bros., this Court commented on the serious consequences of non-compliance as follows:

“The effect of the appellant’s violation of these provisions has been to impair the effectiveness of the program inaugurated by the act, as applied by the order, regulating the handling of oranges in interstate commerce and in foreign commerce to Canada, to disrupt and obstruct such commerce in such fruit, to render partially ineffective the lawful regulation of such commerce, as provided in the act and order, to bring about unstabilized marketing conditions respecting such commerce which have injured and burdened the orange industry, and to defeat the policy of Congress, declared in the act, to promote the orderly exchange of commodities among the several states of the United States and with foreign nations.”
Edwards v. United States, 91 Fed 2nd 767, 778.

In a case dealing with a milk marketing order under the same statute, the Supreme Court said:

“Failure by handlers to meet their obligations promptly would threaten the whole scheme. Even temporary defaults by some handlers would work unfairness to others, encourage wider non-compliance, and engender those subtle forces of doubt and distrust, which so readily dislocate delicate economic arrangements.”
United States v. Ruzicka, 329 US 287, 293.

DEFENDANTS’ NON-COMPLIANCE

There is not the slightest doubt that the defendants failed to comply with the order. The overshipments were intentional and deliberate, not to say premeditated. Many

references to the record might be made in support of the foregoing statement; we believe one is sufficient (R 99).

It is clear that the defendants knew the shipments were in excess of the quota and that an injunction would promptly be issued against further non-compliance. (R 108). But the scheme was to get the shipments made before the injunction could be served. The sole defense is that defendants believed they were immune from punishment by reason of a procedural maneuver which they were advised to make by counsel who had previously recommended such a maneuver to others with some success. (R 85-90). See also the three cases of *U. S. v. William S. Wright*, No. 3036-H-Civil; *U. S. v. Alexander Chaskin*, No. 3065 O.C.-Civil; and *U. S. v. A. Levy and J. Zentner Co.*, No. 3081-H-Civil, cited in the memorandum decision by the District Court. (R 65-67).

The forfeiture claimed against defendants is not a criminal penalty. There is no requirement that wrongful intent be shown as when a defendant is accused of a crime. As was said by the Supreme Court in a case involving forfeiture under the Internal Revenue Laws:

“Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforceable by civil proceeding since the original Revenue Law of 1789. * * * In spite of their comparative severity such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions.” (Citing cases). *Helvering v. Mitchell*, 303 US 391, 400.

It seems unnecessary to burden the Court with any further repetition of the argument and supporting authorities set forth in the brief for the United States. We submit that the conclusion should be that the defendants “willfully” exceeded their allotments under the navel

marketing order and the statutory forfeiture should be recovered by the United States.

The decision in this case will be a signal to other handlers of navel oranges and to handlers under other similar marketing orders either that compliance with such orders can be effectively enforced or that a method is readily available by which limitations on shipments may be ignored without risk of monetary loss.

CONCLUSION

The judgment of the District Court should be reversed and the case remanded with directions to enter judgment for the United States in accordance with the prayer of the complaint.

Respectfully submitted,

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May 18, 1959



No. 16230

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

**LO BUE BROTHERS, A PARTNERSHIP; MARIO LO BUE,
FRED LO BUE, AND JOSEPH LO BUE, PARTNERS; AND
WILLIAM LUTHER WOODALL, DEFENDANTS-APPELLEES**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN
DIVISION**

BRIEF FOR THE UNITED STATES OF AMERICA, APPELLANT

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 16230

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

LO BUE BROTHERS, A PARTNERSHIP; MARIO LO BUE,
FRED LO BUE, AND JOSEPH LO BUE, PARTNERS; AND
WILLIAM LUTHER WOODALL, DEFENDANTS-APPELLEES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN
DIVISION*

BRIEF FOR THE UNITED STATES OF AMERICA, APPELLANT

JURISDICTIONAL STATEMENT

The complaint in this case (R. 3-11)¹ was filed in the United States District Court for the Southern District of California, Northern Division, pursuant to the provisions of 7 U.S.C. 1952 ed. § 608a(5)-(7) of the Agricultural Marketing Agreement Act of 1937, as amended, and 28 U.S.C. 1952 ed. §§ 1337, 1345, and 1355. It is alleged in the complaint that the defendants, *i.e.*, the appellees on this appeal, hereinafter re-

¹ The references to the record are to the printed Transcript of Record on this appeal.

ferred to as defendants, "willfully" shipped navel oranges in excess of the allotments established for the defendant Lo Bue Brothers for the weekly periods from April 1, 1956, through April 15, 1956, under the provisions of the Order, as amended, Regulating the Handling of Navel Oranges Grown in Arizona and a Designated Part of California (18 F.R. 5638 *et seq.*, 19 F.R. 8129 *et seq.*, 7 CFR § 914.1 *et seq.*), thereby subjecting the defendants to liability for three times the market value of the fruit shipped in excess of the allotments (R. 3-11). The defendants, in their answer, denied liability (R. 11-19).

The judgment of the District Court dismissing the complaint was entered on July 31, 1958 (R. 91-92), and the notice of appeal was filed on September 18, 1958 (R. 92). The jurisdiction of this Court of Appeals is based on 28 U.S.C. 1952 ed. § 1291.

STATUTE INVOLVED

The Agricultural Marketing Agreement Act of 1937,² as amended (7 U.S.C. 1952 ed. § 601 *et seq.*),

² The statute (50 Stat. 246) is a re-enactment, with amendments, of various provisions in the Agricultural Adjustment Act of 1933 (48 Stat. 31), as amended, including the amendments in the Act of August 24, 1935 (49 Stat. 750). Certain sections of the Agricultural Adjustment Act of 1933 with respect to a processing tax on cotton were held invalid in *United States v. Butler*, 297 U.S. 1, 53-78. The remaining provisions of the Agricultural Adjustment Act of 1933, as amended by the Act of August 24, 1935, relative to marketing agreements and marketing orders were, however, separate and distinct from the sections which were invalidated in the *Butler* case, and the statutory provisions for marketing agreements and marketing orders continued in effect. *United States v. David Buttrick Co.*, 91 F. 2d 66, 67-69 (C.A. 1); *Edwards v. United States*,

authorizes the Secretary of Agriculture to issue and amend orders³ regulating the handling of certain agricultural commodities or products thereof, including oranges. 7 U.S.C. 1952 ed. § 608c (1) and (2). The Secretary is required to give due notice of and an opportunity for a hearing upon a proposed order whenever he has reason to believe that the issuance of an order will tend to effectuate the declared policy of the Act. 7 U.S.C. 1952 ed. § 608c(3). After notice and opportunity for hearing, the Secretary shall issue an order if, *inter alia*, he finds, upon the evidence introduced at the hearing, that the issuance of the order and all of its terms and conditions will

91 F. 2d 767, 789 (C.A. 9); *Whittenburg v. United States*, 100 F. 2d 520, 521 (C.A. 5). The statutory provisions in the Agricultural Adjustment Act of 1933, as amended, for marketing orders and marketing agreements were regarded by Congress as being within the plenitude of its power to regulate commerce, and by re-enacting and further amending these statutory provisions by means of the Agricultural Marketing Agreement Act of 1937 any question as to their separability, under the decision in the *Butler* case, was obviated. See, *e.g.*, H. R. Rep. No. 468, 75th Cong., 1st Sess. 2; S. Rep. No. 565, 75th Cong., 1st Sess. 2-3; *United States v. Rock Royal Co-op.*, 307 U.S. 533, 568-571; *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119-123. The decision in *United States v. Butler*, 297 U.S. 1, "expressly reserved the question of whether the regulation of agriculture was within the commerce power" and subsequently the Supreme Court "decided the question in favor of the congressional power." *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254, 259.

³The Secretary of Agriculture is also authorized to enter into marketing agreements with handlers. 7 U.S.C. 1952 ed. § 608b. A marketing agreement, however, is inapplicable to persons who do not sign the agreement, whereas a marketing order is applicable to all of the handling transactions which are within its terms.

tend to effectuate the declared policy of the Act with respect to the commodity. 7 U.S.C. 1952 ed § 608c(4).

The Act provides, *inter alia*, for “[a]llotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.” 7 U.S.C. 1952 ed. § 608c(6)(C). Orders may be made effective on the basis of the requisite approval by handlers and producers, and in some circumstances on the basis of approval by producers only. 7 U.S.C. 1952 ed. § 608c(8) and (9).

It is provided in § 8a(5) of the Act, that “[a]ny person willfully exceeding any quota or allotment fixed for him under * * * [the Act], and any other person knowingly participating, or aiding, in the ex-

ceeding of said quota or allotment shall forfeit to the United States a sum equal to three times the current market value of such excess, which forfeiture shall be recoverable in a civil suit brought in the name of the United States.” 7 U.S.C. 1952 ed. § 608a(5). Upon the request of the Secretary, it is the duty of the several United States Attorneys, in their respective districts, “to institute proceedings to enforce the remedies and to collect the forfeitures” provided for in the Act. 7 U.S.C. 1952 ed. § 608a(7). Also, the “several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement” made pursuant to the Act. 7 U.S.C. 1952 ed. § 608a(6).

The Act provides, in § 8c(15)(A), that “[a]ny handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom.” 7 U.S.C. 1952 ed. § 608c(15)(A). The handler shall thereupon be given an opportunity for a hearing,⁴ and the Secretary shall make a ruling upon the prayer of the petition. “which shall be final, if in accordance with law.” *Ibid.* Judicial review of the administrative determination may be obtained by filing an application for

⁴ An administrative petition or hearing of this nature is frequently referred to in the testimony in this case as a “15(A) petition,” a “15(A) hearing,” or a “15(A).” See, *e.g.*, R. 107, 121, 122, 156, 157.

review, within twenty days from the entry of the ruling, in the United States District Court in any district in which the handler is an inhabitant or has his principal place of business. 7 U.S.C. 1952 ed. § 608c(15)(B). If the Court determines that the administrative ruling is not in accordance with law, "it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires." *Ibid.*

The pendency of proceedings instituted by a handler challenging the validity of an order, a provision of an order, or an obligation imposed in connection with an order shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to § 8a(6) of the Act (7 U.S.C. 1952 ed. § 608a(6)), *supra*, which authorizes the district courts specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement. 7 U.S.C. 1952 ed. § 608c(15)(B).

Section 8c(14) of the Act provides, in addition, that any "handler subject to an order * * *, or any officer, director, agent, or employee of such handler, who violates any provision of such order * * * shall, on conviction, be fined not less than \$50 or more than \$500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: *Provided*, That if the court finds that a petition pursuant to subsection (15) of this section [*i.e.*, a petition for administrative review under § 8c(15)(A), *supra*] was filed and prosecuted by the

defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant * * *." 7 U.S.C. 1952 ed. § 608c(14).

THE ORDER

The Order Regulating the Handling of Navel Oranges grown in Arizona and a Designated Part of California⁵ was issued on September 16, 1953, effective September 22, 1953, on the basis of the evidence adduced at a public hearing on the proposed program. 18 F.R. 5638 *et seq.* It was determined that the regulatory program was favored by the handlers who during the period from November 1, 1952, through July 15, 1953, handled not less than 80 percent of the volume of navel oranges covered by the order and by at least three-fourths of the producers who participated in a referendum with respect to the order,

⁵ Similar regulatory programs were in effect from January 13, 1936, to May 17, 1947 (12 F.R. 2467), and from October 26, 1942, to March 8, 1952 (7 F.R. 8576; 17 F.R. 2085). A marketing agreement is also in effect with respect to the handling of navel oranges grown in Arizona and the designated part of California. The marketing agreement, however, is inapplicable to handlers who did not sign the agreement. *Supra*, fn. 3, p. 3. The marketing agreement was "executed by handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping navel oranges covered by this order) who during the period November 1, 1952, through July 15, 1953 [the representative period determined by the Secretary], handled not less than 80 percent of the volume of navel oranges covered by this order." 18 F.R. 5639.

and who produced at least two-thirds of the volume of navel oranges in the relevant production area during the specified period. 18 F.R. 5639.

The order provides⁶ for the establishment of a Navel Orange Administrative Committee consisting of eleven members to assist in the administration of the regulatory program and to make recommendations to the Secretary with respect to volume and size regulations. 7 CFR §§ 914.20–914.51, 914.63. The production area with respect to which the order is applicable includes the State of Arizona and that part of the State of California south of the 37th Parallel (7 CFR § 914.4), and the production area is divided into four prorate districts (7 CFR § 914.66). Whenever the Secretary finds, from the recommendations and information submitted by the administrative committee, or from other available information, “that to limit the quantity of oranges which may be handled in each prorate district during a specified week will tend to effectuate the declared policy of the Act, he shall fix such quantity” of oranges that may be handled.⁷ 7

⁶ The order (18 F.R. 5638 *et seq.*) was amended on August 1, 1954 (19 F.R. 2941 *et seq.*), but in the main the original order was in effect during the periods involved in this case. The amendatory action relates to procedural or administrative aspects of the program, and the substantive provisions of the original order are the relevant regulatory requirements in this case. Hence the term “order” is used, in this brief, as referring to the regulatory provisions which are relevant here (18 F.R. 5638 *et seq.*, 19 F.R. 8129 *et seq.*, 7 CFR § 914.1 *et seq.*).

⁷ Elaborate findings of fact were made by the Secretary with respect to the various regulatory requirements in the order. 18 F.R. 4708–4722. It was found, *inter alia*, by the Secretary that “producers exert strong pressures upon handlers to ship

CFR § 914.52. Similarly, size regulations may be issued by the Secretary applicable in each prorate district. 7 CFR § 914.64.

Each person who has oranges available for current shipment is required to make application for a prorate base to the administrative committee, and the administrative committee fixes, in accordance with the criteria set forth in the order, the prorate base for each person who is entitled thereto. 7 CFR § 914.53. Whenever the Secretary fixes the quantity

their fruit. It is extremely difficult for operators of packing-houses to ignore such pressures" and the order "provides a means to withstand such pressures to ship and thereby to adjust the quantity of fruit shipped to that required in marketing channels. In addition, the * * * [order] makes readily available to handlers knowledge of the quantity which is to be shipped each week, as well as more accurate knowledge of the quantity of fruit available in and enroute to consumer markets. Moreover, receivers of California-Arizona navel oranges would be provided with a basis for maintaining their commercial operations in the light of information with respect to the rate at which supplies will be made available to them." 18 F.R. 4710. "Such conditions do not exist in the absence" of this regulatory program and "handlers, in the absence of some program providing restraint of shipments * * * ship excessive quantities because of desires of producers to pick their fruit and thereby avoid losses through damage or deterioration in the groves. Moreover no individual handler or group of handlers successfully can increase the level of prices by reducing shipments because other handlers can nullify such action by increasing their shipments accordingly." *Ibid.* The ultimate finding was made by the Secretary that the order "is needed to effectuate the declared policy of the act by establishing orderly marketing conditions for navel oranges grown in the production area through providing a means of limiting the quantity of such oranges that may be shipped each week to commercial fresh channels." *Ibid.*

of oranges which may be handled during any week in a prorate district, the administrative committee calculates the allotment of each person on the basis of the prorate base of the person and the total quantity of oranges grown in the district which may be handled during the week. 7 CFR § 914.54. Provisions in the order relate to overshipments, undershipments, and allotment loans between handlers, with appropriate adjustments in subsequent allotments. 7 CFR §§ 914.55-914.57. Administrative regulations, pursuant to the order, are also in effect. 18 F.R. 5645 *et seq.*, 19 F.R. 8136 *et seq.*, 7 CFR § 914.100 *et seq.*

STATEMENT OF FACTS

The defendants, *i.e.*, the appellees on appeal, Mario Lo Bue, Fred Lo Bue, and Joseph Lo Bue are partners operating as growers, handlers, and shippers of navel oranges in Tulare County, California, which is in Central California in the area designated by the Secretary of Agriculture as Prorate District 1 (R. 20, 79-80).⁸ Their packing plant, at Lindsay, California, is operated as a partnership under the trade name of Lo Bue Brothers (R. 20, 79). William Luther Woodall, also a defendant-appellee, is the sales manager for Lo Bue Brothers (R. 20, 79-80).

Four geographical prorate districts are established under the regulatory order (7 CFR § 914.66), and the Secretary of Agriculture fixed the quantity of navel oranges which could be handled in Prorate District 1 during the period beginning at 12:01 a.m.

⁸ Many of the significant facts in the case are set forth in the stipulation of facts (R. 19-50) and the supplemental stipulation of facts (R. 51-62).

on April 1, 1956, and ending at 12:01 a.m. on April 8, 1956, at 277,200 cartons (Navel Orange Regulation No. 81, 21 F.R. 2037; R. 21, 81). Also, the quantity of navel oranges grown in Prorate District 1 which could be handled during the weekly period beginning at 12:01 a.m. on April 8, 1956, and ending at 12:01 a.m. on April 15, 1956, was fixed at 231,000 cartons (Navel Orange Regulation No. 82, 21 F.R. 2267; R. 21-22, 81).

A prorate base and allotment were fixed for Lo Bue Brothers for the two weekly periods involved in the case (R. 22-23, 81-82), and during the period from 12:01 a.m. on April 1 to 12:01 a.m. on April 8, 1956, Lo Bue Brothers was permitted to handle, under the order, 12,363 cartons of navel oranges (R. 22-23, 82) but Lo Bue Brothers shipped 35,779 cartons of navel oranges during this period (R. 24, 83) or 23,416 cartons in excess of the quantity permissible under the order (R. 24, 83). Similarly, during the period beginning at 12:01 a.m. on April 8, 1956, and ending at 12:01 a.m. on April 15, 1956, Lo Bue Brothers could handle, under the order, 7,433 cartons of navel oranges (R. 23-24, 83) but on April 8, 1956, Lo Bue Brothers shipped 2,933 cartons in excess of the amount which it was permitted to ship under the order (R. 24, 83-84).

Twenty-three of the excess shipments involved in this case occurred on Saturday, April 7 (R. 24, 33-34, 84), and the three remaining shipments were on Sunday, April 8 (R. 24, 34, 84). The oranges in two of the excess shipments were sold at the time of their shipment, but the oranges in the other 24 shipments were not sold until several days later (R. 111). The com-

plaint filed by the United States prays for judgment in the amount of \$149,612.22 (R. 10), which is three times the then current market value of the excess shipments (R. 24, 33-34).

An injunction proceeding was commenced on April 12, 1956, by the United States, a temporary restraining order was issued against the defendants, and on April 19, a consent decree was issued enjoining the defendants from violating the order or any lawful regulation issued under the order (R. 28, 88-89).

The excess shipments involved in this case were made by Lo Bue Brothers through William Luther Woodall, its sales manager (R. 99, 134). Mr. Woodall knew that the shipments were in excess of the allotments for Lo Bue Brothers (R. 99), and the primary issue is whether, in the circumstances, the defendants are exempt from the statutory penalties for which suit is brought.

The defendants consulted an attorney, Mr. G. V. Weikert, to determine how they could ship their excess fruit, and the attorney advised them to file a petition under § 8c(15)(A) of the Act for administrative review of the applicable allotments (R. 106-108, 121-122, 134, 156-188). The petition was signed by Mario Lo Bue on Thursday, April 5, 1956, and mailed in Los Angeles, California, by Mr. Weikert, air mail, registered, on that date (R. 25, 85, 123, 183). On Friday, April 6, Mr. Weikert said to the defendants that "by now the petition would be on file with the Secretary of Agriculture, and if they had fruit to ship in excess of their allotment they could begin the next day to make such shipments and could continue unless and until they

received an injunction or restraining order stopping them" (R. 183). However, the administrative petition was not received or filed in the office of the Hearing Clerk, in the United States Department of Agriculture, until Monday, April 9, 1956 (R. 29-30, 37-44, 62, 87), *i.e.*, after the excess shipments involved in this case.

The administrative petition under § 8c(15)(A) of the Act was filed by the defendants because they were concerned over the deterioration of the fruit which they had available for shipment (R. 106-107, 181, 206-209, 229-230). Mario Lo Bue testified that "the fact the fruit was deteriorating and dropping heavy on the ground is what made us seek this advice [from Mr. Weikert] to see whether we could ship any of this fruit. * * * We sought to get protection on these oranges that was dropping. We felt there was some law that would protect the grower from losing all this fruit * * *" (R. 106). Mr. Lo Bue further testified that the "only" reason for filing the administrative petition was "because the fruit was going bad" (R. 121). The defendants' attorney, Mr. Weikert, also said that the defendants consulted him because, as they contended, "the fruit was deteriorating and dropping" (R. 181).

Mr. Lo Bue also testified that Mr. Weikert advised that by "filing a 15(A) that we could ship these oranges and be in our rights" (R. 107). Mr. Weikert informed Mr. Lo Bue that they would "probably be served an injunction" (R. 108, 117), but Mr. Lo Bue did not expect the injunction to be

served during the weekend of April 7 and 8 when the excess shipments were made (R. 118-121).

William Luther Woodall, sales manager of Lo Bue Brothers, testified that he attended meetings of the Navel Orange Administrative Committee in Los Angeles on March 25 and March 29, 1956, representing himself (R. 136-143), and he told the Committee that he thought that Central California "was being dealt a very raw deal, * * * and I was going to see if there was a way that I could move my fruit, if there was any way possible I was going to ship my fruit" (R. 141). M. D. Street, a member of the administrative committee (R. 143-144), also testified that Mr. Woodall "made it quite clear to the Committee, as he put it, he was getting a raw deal and he intended to move his fruit, to ship his fruit in one way or another, and he would find some way to do it" (R. 145-146). Similarly, Michael Coogan, manager of the administrative committee (R. 153), testified that on March 29, 1956, after the meeting of the administrative committee, he had a conversation with Mr. Woodall, and that "Mr. Woodall said that he had a plan whereby he was going to ship his fruit, and I told him as manager he must understand it was my job to catch him if he shipped in excess of the allotment, and he said, 'Well, I ain't going to tell you what I am going to do.' And I said 'Naturally' " (R. 154).

Mr. Woodall further testified that he saw Mr. Weikert in Mr. Weikert's office in Los Angeles during March or April (R. 156-159), and Mr. Woodall asked Mr. Weikert if there was "any way,

legal right that we can move oranges. We felt our rights was being infringed; they prorated the oranges way past any other year, of the historical life of navel oranges in Tulare County, they were deteriorating very badly, bringing a dollar a box under Southern California oranges, and that was along those lines, the condition of our fruit, and if there was any way we could get relief" (R. 158). Mr. Woodall testified that his purpose in seeing Mr. Weikert was to see if there was any legal way to ship the oranges (R. 159-160), and that Mr. Weikert replied that the only way was by "filing a 15(A)," and that as "soon as the 15(A) petition was filed," they could immediately start shipping oranges (R. 160).

Mr. Weikert testified that he advised Mr. Woodall that "where a 15(A) petition is filed in good faith the order or allotment complained of is in effect suspended until there is a decision on the petition, and that the petitioner is exempted from penalties prescribed by the Act" (R. 182). Mr. Weikert also testified that Mario Lo Bue telephoned him later, with Mr. Woodall on the extension, and told him to prepare a petition under § 8c(15)(A) of the Act along the lines previously discussed with Mr. Woodall (R. 182). After the petition was prepared, Mr. Weikert telephoned Mr. Lo Bue, and Mr. Lo Bue came to Mr. Weikert's office in Los Angeles and signed the petition on Thursday, April 5 (R. 183, 186). Mr. Weikert testified that the petition was mailed on the same day to Washington, air mail, registered, and "late the next day I telephoned Mr. Lo Bue at Lindsay,

with Mr. Woodall on the extension at Lindsay, and told them both that by now the petition would be on file with the Secretary of Agriculture, and if they had fruit to ship in excess of their allotment they could begin the next day to make such shipments and could continue unless and until they received an injunction or restraining order stopping them" (R. 183). Mr. Weikert further testified that he has always proceeded on the assumption that an administrative petition was filed with the Secretary the day after he sent it by air mail to Washington, and that this is the first occasion on which any question has been raised with respect to the filing date (R. 184).

The administrative hearing pursuant to the petition filed under § 8c(15)(A) of the Act was held on June 14, 1956 (R. 174), and Mr. Woodall testified that he does not remember whether he saw or communicated with Mr. Weikert during the period from the filing of the administrative petition to the hearing (R. 174-176). The decision on the administrative petition was adverse to the defendants, and no appeal was taken from the administrative decision (R. 28, 88, 331-348).

JUDGMENT OF THE DISTRICT COURT

The District Court entered judgment in favor of the defendants on the ground that the shipments by Lo Bue Brothers in excess of its allotments were not "willful" (R. 91). The Court referred, in its memorandum decision, to three prior decisions in which a District Court held that the proper filing of an administrative petition under § 8c(15)(A) of the Act

exempts the handler from the civil penalty provisions under § 8a(5) of the Act in addition to the provisions for a fine of \$50 to \$500 under § 8c(14) of the Act, even though the exemption appears only in § 8c(14) of the Act, but the Court in the case at bar concluded that it is unnecessary to resolve that issue inasmuch as it was concluded, in this case, that the excess shipments were not “willful” (R. 65-72). Specifically, the Court concluded that the excess shipments were not willful because the defendants relied on the advice of Mr. Weikert (1) that the filing of a petition under § 8c(15)(A) of the Act would exempt them from civil liability as well as from a fine under § 8c(14) of the Act and (2) that the administrative petition mailed in Los Angeles on April 5, air mail, registered, “would be on file with the Secretary of Agriculture” on April 6, and that they could begin the next day to make shipments in excess of their allotments (R. 183, 71-72) even though it was found by the District Court that the petition “was not filed in the office of the Secretary of Agriculture, Washington, D.C. until in the afternoon of April 9, 1956” (R. 87).

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court erred in finding and concluding that the defendants', *i.e.*, appellees', shipments of navel oranges in excess of the relevant quotas or allotments under the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 601 *et seq.*) were not “willful” within the meaning of § 8a(5) of the Act (7 U.S.C. 1952 ed. § 608a(5)).

2. The shipments of navel oranges by the defendants in excess of the relevant quotas or allotments pursuant to the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 601 *et seq.*) were not accidental, involuntary, or unintentional—that is to say, the defendants knowingly and intentionally made the excess shipments of navel oranges involved in this case—and accordingly the District Court erred in finding and concluding that the excess shipments of navel oranges by the defendants were not “willfully” made within the meaning of § 8a(5) of the Act (7 U.S.C. 1952 ed. § 608a(5)).

3. The petition filed by the defendants under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 608c(15)(A)) was not filed in the United States Department of Agriculture until after the defendants’ shipments of navel oranges in excess of the relevant quotas or allotments pursuant to the Act, and accordingly the District Court erred in finding and concluding that the excess shipments of navel oranges, involved in this suit, by the defendants were not “willfully” made within the meaning of § 8a(5) of the Act (7 U.S.C. 1952 ed. § 608a(5)).

4. The defendants relied on an erroneous opinion to the effect that their petition under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 608c(15)(A)) had been filed in the United States Department of Agriculture, and accordingly the District Court erred in finding and concluding that because the defendants relied on such opinion—and subsequently shipped navel oranges in

excess of the relevant quotas or allotments under the Act—the defendants' shipments of navel oranges in excess of the relevant quotas or allotments under the Act were not "willful" within the meaning of § 8a(5) of the Act (7 U.S.C. 1952 ed. § 608a(5)).

5. The defendants did not file and prosecute their petition under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 608c(15)(A)) in good faith and not for delay, and accordingly the District Court erred in finding and concluding that the excess shipments of navel oranges, involved in this suit, by the defendants were not "willfully" made within the meaning of § 8a(5) of the Act (7 U.S.C. 1952 ed. § 608a(5)).

6. The filing of a petition under § 8c(15)(A) of the Act (7 U.S.C. 1952 ed. § 608c(15)(A))—either before or after the shipments of navel oranges by the defendants in excess of the relevant quotas or allotments under the Agricultural Marketing Agreement Act of 1937—does not, as a matter of law, exempt the defendants from liability under the provisions of § 8a(5) of the Act (7 U.S.C. 1952 ed. § 608a(5)) in this case, and accordingly the District Court erred in finding and concluding that, because the defendants relied on legal advice to the effect that the filing of a petition under § 8c(15)(A), if filed in good faith, would exempt them from such liability, the shipments of navel oranges in excess of the relevant quotas or allotments under the Act were not "willfully" made within the meaning of § 8a(5) of the Act.

7. The defendants relied on erroneous legal advice in making their shipments of navel oranges in excess

of the relevant quotas or allotments under the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 601 *et seq.*), and accordingly the District Court erred in finding and concluding that because the defendants relied in good faith on such legal advice, the defendants' excess shipments of navel oranges were not "willfully" made so as to subject the defendants to liability pursuant to § 8a(5) of the Act (7 U.S.C. 1952 ed. § 608a(5)).

8. The District Court erred in finding and concluding that—in view of its findings and conclusion that the defendants accepted, believed, and relied in good faith on the advice given to them by a reputable attorney to the effect that the filing of a petition, in good faith, by the defendants pursuant to § 8c(15)(A) of the Act (7 U.S.C. 1952 ed. § 608c (15)(A)) would, as a matter of law, exempt the defendants from liability for penalties under the Act with respect to shipments during the period from the filing of such petition to the decision thereon by the administrative agency, unless shipments were enjoined by a District Court, and that the defendants accepted, believed, and relied in good faith on such advice given to them by the attorney and filed or undertook to file such a petition under § 8c(15)(A) of the Act—the defendants' shipments of navel oranges in excess of the relevant quotas or allotments under the Act were not "willful" within the meaning of § 8a(5) of the Act (7 U.S.C. 1952 ed. § 608a(5)).

9. The findings and conclusion by the District Court that the shipments of navel oranges by the defendants in excess of the relevant quotas or allotments pursuant

to the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 601 *et seq.*) were not “willfully” made within the meaning of § 8a(5) of the Act are, on the basis of the record in the case, clearly erroneous.

10. The findings and conclusion by the District Court that the defendants accepted and believed the advice of a reputable attorney and acted in good faith in reliance thereon in making the shipments of navel oranges in excess of the relevant quotas or allotments pursuant to the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 601 *et seq.*) and in so doing exercised ordinary and reasonable care and caution and did not knowingly, intentionally, or willfully exceed the relevant quotas or allotments are, on the basis of the record in the case, clearly erroneous.

11. The District Court erred in failing to find, conclude, and enter judgment to the effect that the shipments of navel oranges by the defendants in excess of the relevant quotas or allotments pursuant to the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 601 *et seq.*) were “willfully” made within the meaning of § 8a(5) of the Act (7 U.S.C. 1952 ed. § 608a(5)), and that the defendants are liable under the terms of § 8a(5) of the Act.

SUMMARY OF ARGUMENT

The defendants, *i.e.*, appellees, shipped navel oranges in excess of their marketing quotas established pursuant to the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 601 *et seq.*), and the defendants knew that the shipments were in excess

of their quotas. This action was filed to recover civil penalties pursuant to § 8a(5) of the Act which provides that “[a]ny person willfully exceeding any quota or allotment fixed for him * * * [under the Act], and any other person knowingly participating, or aiding, in the exceeding of said quota or allotment shall forfeit to the United States a sum equal to three times the current market value of such excess, which forfeiture shall be recoverable in a civil suit brought in the name of the United States” (7 U.S.C. 1952 ed. § 608a(5)).

The District Court was of the opinion that the defendants did not “willfully” exceed their quotas because the defendants relied on the advice of an attorney with respect to the filing of a petition, under § 8c(15)(A) of the Act, for administrative review of the quotas (R. 71-72, 89-91, 182). The attorney advised the defendants that “the statute provides that where a (15)(A) petition [*i.e.*, a petition filed pursuant to 7 U.S.C. 1952 ed. § 608c(15)(A)] is filed in good faith the order or allotment complained of is in effect suspended until there is a decision on the petition, and that the petitioner is exempted from penalties prescribed by the Act” (R. 182). The only provision in the Act with respect to an exemption from liability if a petition is properly filed under § 8c(15)(A) is set forth in a proviso in § 8c(14) relative to liability for a fine of \$50 to \$500 for each shipment in excess of a quota (7 U.S.C. 1952 ed. § 608c(14)). But § 8c(14), relied on by the defendants in the District Court (R. 64-65), provides an exemption only “under this subsection,” *i.e.*, § 8c(14), if a petition for ad-

ministrative review is “filed and prosecuted by the defendant in good faith and not for delay” (7 U.S.C. 1952 ed. § 608c(14)).

A. The advice of the defendants’ attorney, with respect to the applicancy of the proviso in § 8c(14) of the Act to a suit for civil penalties under § 8a(5), is erroneous, and reliance on erroneous advice of counsel is not a defense to an action for civil penalties under § 8a(5) of the Act. The provisions for triple forfeiture in § 8a(5) contain no reference to, or qualification by, § 8c(14) or § 8c(15)(A). The proviso in § 8c(14) is expressly delimited to an exception with respect to liability for a fine of \$50 to \$500 imposed “under this subsection,” *i.e.*, under subsection (14) of § 8c of the Act.⁹ In the original draft of the bill, H.R. 8492, 74th Cong., 1st Sess., p. 22, which subsequently was enacted and which included § 8c(14) of the Act, the exception related to convictions “under this title” but the proviso as passed by Congress relates only to an exception with respect to fines imposed “under this subsection.” The entire subsection as enacted by Congress, *viz.*, subsection (14) of § 8c, consists of a single sentence in which the terms “section”—*i.e.*, § 8c of the Act—and “subsection” are both used. This emphasizes that the proviso in § 8c(14)—*i.e.*, relating to an exception with respect to fines imposed under “this subsection”—means just what it says, and there is no basis for construing the excep-

⁹ It is made plain in the Act of August 24, 1935, which enacted § 8c(14), that the “section” is § 8c and the “subsection” is (14). 49 Stat. 750, 753. See also, 48 Stat. 31, 34–35, 670, 672; 50 Stat. 246.

tion imposed under subsection (14) of § 8c of the Act as being applicable, in addition, to a different penalty imposed by a subsection of another section of the Act, *i.e.*, § 8a(5).

When a provision is carefully included in one place in an Act and omitted in another place it should not be implied at the place where it is omitted. *United States v. Atchison, T. & S.F. Ry. Co.*, 220 U.S. 37, 44; *Corn Products Refining Co. v. Benson*, 232 F. 2d 554, 562 (C.A. 2). Where the provisions of two statutory sections are so unlike each other that the comparison exhibits only a contrast, instead of saying that the different sections were designed to be similar "it would seem much more reasonable to say that the one * * * [section] exhibits a legislative mind materially variant in the particulars where the difference exists, from what is exhibited by the other." *Pennington v. Coxe*, 2 Cranch 33, 58-59. See also, *United States v. Cooper Corp.*, 312 U.S. 600, 605.

These sections of the Act were enacted by Congress at different times. The statutory provision for triple forfeiture, *i.e.*, § 8a(5), was enacted as a part of the Jones-Costigan Act of 1934 (48 Stat. 670, 674-675), and at that time the statute contained no § 8c (14), § 8c(15)(A), or similar provisions. Hence, it cannot be said that at the time of the enactment of § 8a(5) it should have been read as if it contained a proviso for exemption from liability if a petition under § 8c(15)(A) is filed and prosecuted in good faith. In addition "willfully" in § 8a(5) could not, at the time of the enactment of the provision for triple forfeiture, have had implicit in it the meaning

that a petition filed and prosecuted in good faith under § 8c(15)(A)—which had not been enacted—would effectuate an exemption from liability for triple forfeiture.

At the time of the enactment of §§ 8c(14) and 8c(15)(A) in the Act of August 24, 1935, the Congress made effective many amendments relating to sentences, clauses, exceptions, provisos, and words in the antecedent legislation. The mere reading, *in extenso*, of these carefully drafted amendments will show that careful and minute attention was given to all of the prior legislative provisions in the drafting of the amendments in the Act of August 24, 1935 (49 Stat. 750), and the enactment of these amendments by Congress. Significantly, there is no amendment to § 8a(5) providing for triple forfeiture. If Congress had intended for the triple forfeiture section, § 8a(5), to be subject to the same proviso as is set forth in the statutory section for a fine of \$50 to \$500, § 8c(14), for each shipment of fruit in excess of a quota, Congress would have said so.

All statutory factors and the legislative history of the various statutory sections plainly show that § 8a(5) of the Act, providing for triple forfeiture, is not to be read so as to contain the exception in § 8c(14). A statute, even a criminal statute, is not to be read “so as to put in what is not readily found there.” *United States v. Hood*, 343 U.S. 148, 151.

Other factors also warrant the reading of the statute so as to give effect to § 8a(5) without interpolating into § 8a(5) the proviso in § 8c(14), and thereby

devitalizing the enforcement provisions in § 8a(5) of the Act. The statute is remedial legislation, and remedial language should be given "hospitable scope" (see, e.g., *Black v. Magnolia Liquor Co.*, 355 U.S. 24, 26). A regulatory statute should be interpreted so that its effectiveness will not be impaired, and if possible an interpretation should be adopted which "will preserve the vitality of the Act and the utility of the language * * *." *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 392. "Remedial statutes should be liberally construed and should be interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers." *Scarborough v. Atlantic Coast Line R. Co.*, 178 F. 2d 253, 258 (C.A. 4), certiorari denied, 339 U.S. 919. Shipments of fruit in excess of a marketing quota strike at the heart of the program. 18 F.R. 4710. Shipments of fruit in excess of a marketing quota, as in this case, constitute disorderly marketing which this regulatory program is designed to prevent. *Ibid.*

B. The so-called "finding" by the District Court (R. 90-91) that the defendants did not "willfully" ship fruit in excess of their quotas is a conclusional or ultimate finding, and under numerous decisions it is well established that an appellate court is free to formulate its independent judgment where, as here, the finding is an ultimate finding, involves a conclusion of law, is induced by an error of law, is a determination of a mixed question of fact and law, and is based on a stipulation of facts and undisputed evidence.

The defendants "willfully" exceeded their quotas within the meaning of § 8a(5) of the Act irrespective of whether they had an evil motive or knew that their shipments were illegal. The meaning of the word "willful" is often influenced by its context. *Spies v. United States*, 317 U.S. 492, 497. In numerous cases, involving regulatory statutes, it has been held that an intentional or deliberate act constitutes a "willful" violation even though there is no proof of evil motive or that the defendant knew that his conduct was unlawful. *E.g.*, in *United States v. Gris*, 247 F. 2d 860, 864 (C.A. 2), it was said that "[i]t matters not whether appellant realized his conduct was unlawful. He knew exactly what he was doing; and what he did was a violation of the Federal Communications Act. He intended to do what he did, and that is sufficient" to sustain the conclusion that he "willfully and knowingly" intercepted and divulged telephone communications in violation of the statute. Some of the other cases which are apposite here are *Trenton Chemical Co. v. United States*, 201 F. 2d 776, 777-780 (C.A. 6), certiorari denied, 345 U.S. 994; *Fields v. United States*, 164 F. 2d 97, 99-101 (C.A.D.C.), certiorari denied, 332 U.S. 851; *Dennis v. United States*, 171 F. 2d 986, 990-991 (C.A.D.C.), affirmed on other grounds, 339 U.S. 162; *Chicago, St. P.M. & O. Ry. Co. v. United States*, 162 Fed. 835, 840-842 (C.A. 8), certiorari denied, 212 U.S. 579. It has also been held that the word willful, "even in criminal statutes, means no more than the person charged with the duty knows what he is doing. It

does not mean that, in addition, he must suppose that he is breaking the law." *American Surety Co. v. Sullivan*, 7 F. 2d 605, 606 (C.A. 2).

The decisional law supports our interpretation of the word "willful" as it is used in remedial legislation, such as that in the case at bar.

C. Assuming, *arguendo*, that the filing of an administrative petition under § 8c(15)(A) of the Act "in good faith and not for delay" or that reliance in good faith on erroneous advice is a bar to an action for civil penalties under § 8a(5) of the Act, nonetheless the undisputed facts show that the defendants willfully shipped oranges in excess of their allotments and are liable for civil penalties under § 8a(5).

The intention was deliberate on the part of the defendants to make the shipments of fruit in excess of their quotas, and the petition under § 8c(15)(A) of the Act was filed solely as a maneuver to enable them to make the shipments. After the shipments were made the defendants manifested no interest with respect to the outcome of the adjudicatory proceeding on their petition pursuant to § 8c(15)(A). The decision on the administrative petition was adverse to the defendants (R. 88, 331-348), and although the proceeding was not moot, as a matter of law, no appeal was taken from the adverse administrative decision (R. 28).

The exemption, relied on by the defendants, in § 8c(14) of the Act is applicable only to such violations "as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling

thereon was given to the defendant * * *." 7 U.S.C. 1952 ed. § 608c(14). A petition for administrative review pursuant to § 8c(15)(A) is "deemed to be filed when it is received by the [H]earing [C]lerk" in the Department in Washington, D.C. 7 CFR § 900.69(d). But admittedly, as found by the District Court, the defendants' petition was not "filed," *i.e.*, "received," in the office of the Hearing Clerk in the Department in Washington, D.C. "until in the afternoon of [Monday] April 9, 1956" (R. 87). The excess shipments, however, were made on April 7 and 8 (R. 24, 33-34, 83-84).

The defendants knew that the petition was not mailed in Los Angeles until Thursday, April 5 (R. 123, 186). The defendants knew that the statutory interpretation on which they were relying is applicable only after the petition has been "filed" (R. 160, 182-186). But the defendants made no effort, by telephone or otherwise, to ascertain whether the petition was "filed" on Friday, April 6. Instead the defendants proceeded on the statement of their attorney on April 6 that "by now the petition would be" on file (R. 183). The filing of the petition is the vital factor in the defendants' theory of statutory interpretation, but in this vital respect there was no effort by the defendants to ascertain whether the petition had been filed. The excess shipments were made on April 7 and 8, although the petition was not filed until April 9. These circumstances in conjunction with other factual circumstances, which cannot be fully outlined within the compass of this summary, support the view that

the filing of the petition was merely a maneuver or stratagem on the part of the defendants.

The stipulation of facts and the undisputed evidence warrant the conclusion that the petition under § 8c(15)(A) was not filed "in good faith and not for delay," and that the defendants did not rely, in good faith, on the advice which they received. In brief, the record shows that the defendants willfully shipped navel oranges in excess of their marketing quotas, and are liable for the civil penalties imposed by § 8a(5) of the Act.

ARGUMENT

The defendants intentionally shipped navel oranges in excess of their marketing quotas, and the shipments, willfully made, subject the defendants to liability for civil penalties pursuant to § 8a(5) of the Act

The defendants, *i.e.*, the appellees, admittedly shipped navel oranges on April 7 and 8, 1956, in excess of their marketing quotas and, admittedly, the defendants knew that the shipments were in excess of their quotas (R. 24, 33-34, 83-91, 99, 154, 159-160). Hence the defendants are liable for civil penalties under § 8a(5) of the Act unless the violations were not "willful" within the meaning of the statutory language. The arguments in the case converge on the statutory provision that "[a]ny person willfully exceeding any quota or allotment fixed for him * * * [under the Act], and any other person knowingly participating, or aiding, in the exceeding of said quota or allotment shall forfeit to the United States a sum equal to three times the current market value of such excess, which forfeiture shall be recoverable in a

civil suit brought in the name of the United States.” 7 U.S.C. 1952 ed. § 608a(5).¹⁰

The District Court was of the opinion that the shipments of fruit, in excess of the marketing quotas, were not “willful” because the defendants relied on the advice of an attorney with respect to the filing of a petition, under § 8c(15)(A) of the Act, for administrative review of the quotas (R. 71-72, 89-91, 182). The advice thus referred to by the District Court relates (1) to the time of the filing of the petition for administrative review under § 8c(15)(A), and (2) to the effect—pursuant to the statutory provisions—of such filing.

A petition for administrative review under § 8c(15)(A) of the Act is “deemed to be filed when it is received by the hearing clerk.” 7 CFR § 900.69(d). The District Court found (R. 87), based on the undisputed evidence (R. 28, 35-44), that the petition was not filed in the Office of the Hearing Clerk, in the United States Department of Agriculture, until April 9. The defendants’ excess shipments of fruit

¹⁰ The penalty provisions involved in this case are similar to the provisions for a forfeiture of a “sum equal to three times the market value” of sugar involved in a violation of the Sugar Act of 1948. 7 U.S.C. 1952 ed. Supp. V § 1155(a). See also, the provisions for double damages in 31 U.S.C. 1952 ed. § 231; 40 U.S.C. 1952 ed. § 489(b)(1); 31 U.S.C. 1952 ed. § 443; 31 U.S.C. 1952 ed. § 316a; 46 U.S.C. 1952 ed. § 1356; and for triple forfeiture in 49 U.S.C. 1952 ed. § 41(3). Where, as in the case at bar, a money judgment is sought the Federal Rules of Civil Procedure are applicable even though the word “forfeit” or “forfeiture” is used in the statute. See, *e.g.*, *United States v. Stangland*, 242 F. 2d 843, 846 (C.A. 7); *Miller v. United States*, 242 F. 2d 392, 393-395 (C.A. 6), certiorari denied, 355 U.S. 833.

were on April 7 and 8 (R. 24, 33-34, 83-84), but the defendants' attorney stated to them that the petition "would be on file" by April 6 (R. 183).¹¹

With respect to the effect of the filing of a petition under § 8c(15)(A) of the Act, the defendants relied in the District Court (R. 64-65) on the proviso in § 8c(14) of the Act which provides an exception from liability "under this subsection," *i.e.*, § 8c(14), from a fine of \$50 to \$500 for each shipment in excess of a quota, if a petition for administrative review pursuant to § 8c(15)(A) of the Act is "filed and prosecuted by the defendant in good faith and not for delay" (7 U.S.C. 1952 ed. § 608c(14)). The District Court failed to resolve the issue as to whether the defendants' attorney, in giving advice to the defendants relative to the shipment of oranges in excess of their quotas, properly interpreted the proviso in § 8c(14) as being applicable to the civil penalties pursuant to § 8a(5) of the Act.

We shall show that (1) the advice of the defendants' attorney as to the interpretation of the proviso in § 8c(14) of the Act is erroneous, and (2) reliance on erroneous advice of counsel is no defense to an

¹¹ Assuming, *arguendo*, that our construction of the Act with respect to the effect of the filing of a petition under § 8c(15)-(A) of the Act is erroneous, nonetheless the excess shipments occurred prior to the filing of the petition for administrative review, and the statutory exception referred to by the defendants' counsel, in giving his advice to the defendants, relates only to "such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant * * *" (7 U.S.C. 1952 ed. § 608c(14)). See, *infra*, pp. 63-68.

action for civil penalties under § 8a(5) of the Act. Assuming, *arguendo*, the relevancy of the proviso in § 8c(14), we shall show that in any event the defendants did not file the petition for administrative review “in good faith and not for delay,” as required by the proviso in § 8c(14) of the Act, and that the defendants failed to take necessary steps to insure that their excess shipments were made subsequent to the filing of the petition under § 8c(15)(A). The defendants intentionally shipped navel oranges in excess of their marketing quotas, and the shipments, willfully made, subject the defendants to liability for triple forfeiture pursuant to § 8a(5).

A. The proviso in § 8c(14) of the Act—relating to an exemption, from a fine of \$50 to \$500 imposed by § 8c(14), if a petition for administrative review is properly filed under § 8c(15)(A)—is not applicable in a suit for civil penalties, under § 8a(5) of the Act, for shipments of fruit in excess of a quota. The contrary advice by the defendants’ attorney is erroneous

1. *The statutory language and its legislative history plainly show that the proviso or exception in § 8c(14) is not applicable to § 8a(5) with respect to a suit for triple forfeiture*

The basis for the complaint in this case is the statutory provision in § 8a(5) of the Act imposing triple forfeiture with respect to the willful shipment of fruit in excess of a marketing quota (7 U.S.C. 1952 ed. § 608a(5)). There is no exemption or exception in § 8a(5) of the Act. Nothing is said in the statute with respect to an exemption or exception from the liability for triple forfeiture, under § 8a(5), if a petition for administrative review is filed under § 8c(15)(A) of the Act. The defendants relied, however, in the District Court (R. 64–65) on the proviso in § 8c(14) of the Act. A fine of \$50 to \$500 is provided for by § 8c(14), and the proviso states that

“if the court finds that a petition pursuant to subsection (15) of this section [*i.e.*, § 8c(15) of the Act] was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed *under this subsection* [emphasis supplied] for such violations as occurred between the date upon which the defendant’s petition was filed with the Secretary, and the date upon which notice of the Secretary’s ruling thereon was given to the defendant * * *” (7 U.S.C. 1952 ed. § 608c(14)).

The proviso in § 8c(14) of the Act is expressly limited to an exception with respect to a fine of \$50 to \$500 imposed “under this subsection,” *i.e.*, under subsection (14) of § 8c of the Act. In the original draft of the bill, H.R. 8492, 74th Cong., 1st Sess., p. 22, which subsequently was enacted and which included § 8c(14) of the Act, the exception related to convictions “under this title,”¹² but the proviso, as passed by Congress, relates specifically to an exception as to fines imposed “under this subsection.”¹³ The

¹² Similarly, earlier bills relating to the subject matter which is now contained in the proviso in § 8c(14) of the Act provided that the exception is applicable to convictions “under this title.” See, H.R. 5585, 74th Cong., 1st Sess., p. 4; H.R. 8052, 74th Cong., 1st Sess., p. 8; S. 1807, 74th Cong., 1st Sess., p. 5.

¹³ It is plainly stated in the Act of August 24, 1935, enacting, *inter alia*, § 8c(14), that the “section” is § 8c and the subsection is (14). 49 Stat. 750, 753. Also the Jones-Costigan Act of 1934, enacting, *inter alia*, § 8a(5), states that the “section” is § 8a, and thus the subsection is (5). 48 Stat. 670, 672. Again in the enactment of the Agricultural Marketing Agreement Act of 1937 the Congress identifies the “section” as § 8c. 50 Stat. 246. Also the proviso in § 8c(14), relied on by the defendants, refers to “subsection (15)” of this section, *i.e.*, § 8c(15). 7 U.S.C. 1952 ed. § 608c(14).

entire subsection, as enacted by Congress, *viz.*, subsection (14) of § 8c, consists of a single sentence in which the terms “section”—*i.e.*, § 8c of the Act (7 U.S.C. 1952 ed. § 608c(1)–(19))—and “subsection” are both used.¹⁴ This emphasizes the view that the proviso in § 8c(14)—*i.e.*, relating to an exception with respect to fines imposed “under this subsection”—means just what it says. The collocation of terms is significant of the legislative intent. See, *e.g.*, *Crawford v. Burke*, 195 U.S. 176, 190; *Federal Land Bank of Springfield v. Hansen*, 113 F. 2d 82, 84 (C.A. 2). The use of the terms “section” and “subsection” in the same sentence of the Act was manifestly deliberate, and there is no basis for construing an exception applicable to fines imposed under subsection (14) of § 8c of the Act as being applicable, in addition, to a different penalty imposed under a different subsection of another section of the Act, *i.e.*, § 8a(5).

The provisions of §§ 8a(5) and 8c(14) of the Act plainly provide for different fines or penalties, and it

¹⁴ The term “section” is used three times and the term “subsection” is also used three times in § 8c(14) of the Act as set forth in the United States Code, but the term “section” appears only twice in § 8c(14) as set forth in the United States Statutes at Large. Subsection (14) of § 8c of the Act as set forth in the United States Code is *verbatim ac litteratim* the same as the provisions in the United States Statutes at Large (49 Stat. 750, 759) except that the last three words which appear in § 8c(14) of the Code, *viz.*, “of this section,” do not appear in the Statutes at Large. The text of the Act in the Statutes at Large is, of course, controlling (1 U.S.C. 1952 ed. § 204(a); *Stephan v. United States*, 319 U.S. 423, 426; *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 379–380), but the difference is immaterial inasmuch as the terms “section” and “subsection” are carefully used in § 8c(14) as set forth in the United States Code and in the Statutes at Large.

is expressly provided in § 8a of the Act that the “remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere” in the Act (7 U.S.C. 1952 ed. § 608a(8)).

When a provision is carefully included in one section of a statute and omitted in another section, it should not be implied in the place at which it is omitted. *United States v. Atchison, T. & S.F. Ry. Co.*, 220 U.S. 37, 44; *Lang v. Commissioner*, 289 U.S. 109, 112; *Corn Products Refining Co. v. Benson*, 232 F. 2d 554, 562 (C.A. 2); *Hamilton v. National Labor Rel. Board*, 160 F. 2d 465, 470 (C.A. 6), certiorari denied, *sub nom. Kalamazoo Stationery Co. v. National Labor Rel. Board*, 332 U.S. 762. Here, as in *Iselin v. United States*, 270 U.S. 245, 250–251, the “statute was evidently drawn with care,” and to interpolate in § 8a(5) of the Act the proviso in § 8c(14) “is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted * * * may be included within its scope.” But to “supply omissions [in a statute] transcends the judicial function.” *Ibid.*

Although the filing of a petition pursuant to § 8c (15) (A) is of significance with respect to the avoiding of a fine under § 8c(14) of the Act, no such exception is provided for with respect to the civil penalties, sought in this case, under § 8a(5) of the Act.¹⁵ It has

¹⁵ The burden rests on a person—the defendants in this case—asserting or relying on an exception to demonstrate that the facts are within the strictly construed terms of the exception. *Schlemmer v. Buffalo, Rochester, &c. Ry.*, 205 U.S. 1, 10;

been said, in circumstances similar to this, that the “fact of a single exception suggests that no other qualification of the absolute prohibition was intended.” *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 76. A matter not covered by a statutory exception is subject to the rule prevailing in the absence of the exception. *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 377; *Bend v. Hoyt*, 13 Pet. 263, 273. Where no additional exception is made, none is intended (*Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 128), and exceptions made in detail “preclude their enlargement by implication” (*Addison v. Holly Hill Co.*, 322 U.S. 607, 617). See also, *Brooks v. St. Louis-San Francisco Ry Co.*, 180 F. 2d 185, 187 (C.A. 8), certiorari denied, 339 U.S. 966. It is familiar doctrine that the judicial function is to “apply statutes on the basis of what Congress has written, not what Congress might have written.” *United States v. Great Northern R. Co.*, 343 U.S. 562, 575.

The provisions for triple forfeiture in § 8a(5) of the Act contain no reference to, or qualification by, §§ 8c(14) or 8c(15)(A). Here, as in *Thornley v. United States*, 113 U.S. 310, 315, we are not called on to explain why Congress should apply one rule to one statutory section and another rule to another

Spokane & Inland R.R. v. United States, 241 U.S. 344, 350; *United States v. Morrow*, 266 U.S. 531, 534–536; *Piedmont & Northern Ry. v. Comm’n*, 286 U.S. 299, 311–312; *Great Atlantic & Pacific Tea Co. v. Federal Trade Com’n.*, 106 F. 2d 667, 674 (C.A. 3), certiorari denied, 308 U.S. 625; *Detroit Edison Co. v. Securities & Exchange Commission*, 119 F. 2d 730, 739 (C.A. 6), certiorari denied, 314 U.S. 618; *Shilkret v. Musiercraft Records*, 131 F. 2d 929, 931 (C.A. 2), certiorari denied, 319 U.S. 742.

statutory section. "It is sufficient to say that it has clearly done so." *Ibid.* If the law is deemed to be unequal in variant respects, "the remedy is with Congress and not with the courts." *Ibid.* When, as here, the statutory terms are plain it is not for the courts to "speculate on probabilities of intention." *Bruner v. United States*, 343 U.S. 112, 116; *Insurance Co. v. Ritchie*, 5 Wall. 541, 544-545. Similarly, in *United States v. Cooper Corp.*, 312 U.S. 600, 605, it was held that it is not the judicial function "to engraft on a statute additions which we think the legislature logically might or should have made." It is not for the courts to beat down distinctions in a statute. *Pennington v. Cox*, 2 Cranch 33, 58-59. "It is the duty of the court, to discover the intention of the legislature, and to respect that intention." *Ibid.* Where the provisions of two statutory sections are so unlike each other that the comparison exhibits only a contrast, instead of saying that these different sections were designed to be similar "it would seem much more reasonable to say, that the one * * * [section] exhibits a legislative mind materially variant in the particulars where the difference exists, from what is exhibited by the other." *Ibid.*

Additional support for our interpretation of the Act is found (1) in the origin of the statutory section for triple forfeiture, *i.e.*, § 8a(5), and (2) in the origin of the enactment by Congress of the administrative review provisions in § 8c(15)(A) and the statutory provisions for a fine of \$50 to \$500 in § 8c(14). The statutory provision for triple forfeiture, *i.e.*, § 8a(5), was enacted as a part of the

Jones-Costigan Act of 1934 (48 Stat. 670, 674-675), as an amendment to the Agricultural Adjustment Act of 1933 (48 Stat. 31).¹⁶ At the time of the enactment of the Jones-Costigan Act of 1934 providing for triple forfeiture, the legislation contained no §§ 8c(14), 8c(15)(A), or similar provisions. It was not until the Act of August 24, 1935 (49 Stat. 750, 759-760), that § 8c(15)(A), relating to administrative review, was enacted by Congress. It was also in the Act of August 24, 1935, that a fine of \$50 to \$500 was provided for, in § 8c(14), and at that time the statutory subsection providing for a fine also included the proviso for an exemption from liability for a fine *under that subsection* if a petition under § 8c(15)(A) is filed and prosecuted in good faith and not for delay. The Act of August 24, 1935, is also an amendment to the Agricultural Adjustment Act of 1933. Hence it cannot be said that at the time of the enactment of these statutory provisions, the section for triple forfeiture, § 8a(5), should be read as if it contained a proviso for exemption from liability if a petition under § 8c(15)(A) is filed and prosecuted in good faith. No such statutory provision as § 8c(15)(A) was in existence at the time of the enactment of the section for triple forfeiture, § 8a(5), and plainly there could have been no ground for reading in such an interpolation. In addition, the word "willfully" in the triple forfeiture section could not, at the time of the enactment of the sec-

¹⁶ See, *supra*, fn. 2, pp. 2-3, for a summary with respect to the genesis of the various statutory provisions in the Agricultural Marketing Agreement Act of 1937.

tion, have had implicit in it the meaning that a petition filed and prosecuted in good faith under § 8c(15)(A)—which was then nonexistent—would effectuate an exemption from liability for triple forfeiture under § 8a(5). Certainly, the term “willfully” could have had no such hidden or latescent meaning at the time of the enactment of the section for triple forfeiture.

There is “no better key” to statutory construction “than the law from which the challenged statute emerged.” *United States v. C.I.O.*, 335 U.S. 106, 112–113. See also, *Hamilton v. Rathbone*, 175 U.S. 414, 419–421; *United States v. Union Pac. R.R. Co.*, 91 U.S. 72, 89. A provision of an act “must take meaning from its historical setting.” *United States v. Henning*, 344 U.S. 66, 72. The statutory section for triple forfeiture, § 8a(5), contained no qualification or exception at the time of its enactment by Congress, and it cannot be gainsaid that the provision for triple forfeiture could not have contained a qualification or exception with respect to the filing of a petition under a statutory section, *viz*, § 8c(15)(A), which was then nonexistent.

There are additional tokens of congressional intention, tokens still within the statutory provisions and all pointing the same way. The Act of August 24, 1935, effectuates many amendments to the Agricultural Adjustment Act of 1933, as amended by the Jones-Costigan Act of 1934. Many of the amendments in the Act of August 24, 1935, relate to sentences, clauses, exceptions, provisos, and words in the antecedent legislation. See *e.g.*, §§ 3–4, 7–11, 14–15,

17, 19-20, 22-24, 26, 29, 35, and 36 in the Act of August 24, 1935 (49 Stat. 750, 753-775). Moreover, §§ 8-10 in the Act of August 24, 1935 (49 Stat. 750, 762), are amendatory of various provisions in § 8a of the Agricultural Adjustment Act, which section, *viz.*, 8a, including § 8a(5) at issue in this case, was added by the Jones-Costigan Act of 1934, as we have shown, *supra*, pp. 38-39. Specifically, § 9 of the Act of August 24, 1935 (49 Stat. 750, 762), amends subsection 8a(6) of the Agricultural Adjustment Act, which is the subsection immediately following the subsection at issue in this case. The mere reading, *in extenso*, of those carefully drafted amendments compels the conclusion that careful and minute attention was given to all of the prior legislative provisions in the drafting of the amendments in the Act of August 24, 1935, and the enactment of those amendments by Congress. Significantly, there is no amendment to § 8a(5) providing for triple forfeiture, even though the Act of August 24, 1935, enacts § 8c(15)(A) and the statutory section for a fine of \$50 to \$500, *i.e.*, § 8c(14). Although the Congress carefully provided in the Act of August 24, 1935, that the filing of a petition under § 8c(15)(A), if filed and prosecuted in good faith and not for delay, would exempt a person from a fine under § 8c(14), it is notable that Congress did not provide for an exception with respect to the liability for triple forfeiture. If Congress had intended for the triple forfeiture section to be subject to the same proviso as is set forth in the statutory section for a fine of \$50 to \$500, for each shipment of fruit in excess of a quota, Congress would have said

so. It is going very far indeed to argue a sameness of Congressional intention from these dissimilar statutory provisions. The differences cannot be disregarded, and the differences are plainly indicative of a difference of Congressional intent.

In short, all statutory factors and the legislative history of the various sections in the Act plainly show that § 8a(5) of the Act, providing for triple forfeiture, is not to be read so as to contain the exception in § 8c(14).¹⁷ A statute, even a criminal statute, is not to be read "so as to put in what is not readily found there." *United States v. Hood*, 343 U.S. 148, 151. The courts, in the interpretation of an Act, are "neither to add nor to subtract, neither to delete nor to distort." *62 Cases of Jam v. United States*, 340 U.S. 593, 596. The Congress has plainly made a distinction, in this respect, between §§ 8a(5) and 8c(14) of the Act, and the variant provisions should be applied as written.¹⁸

¹⁷ The District Court referred (R. 65-66) to three unreported decisions of the United States District Court for the Southern District of California in which it was held that the exception in § 8c(14) is applicable also to § 8a(5). It cannot, however, be said that those unreported decisions—two of the cases were companion cases—are of significance here. It has been held that even a decision of a Court of Appeals "construing an act does not approach the dignity of a well settled interpretation." *United States v. Raynor*, 302 U.S. 540, 552.

¹⁸ It was held in *Scott v. Reid*, 10 Pet. 524, 527, that "where the language of the act is explicit, there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature. * * * [I]t is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they

If one goes beyond the plain meaning that the Act spontaneously yields and beyond the legislative history, other factors also warrant the reading of the statute so as to give effect to § 8a(5) without interpolating into that section the proviso in § 8c(14).

2. *The statutory provision for enforcement actions under § 8a(5), for triple forfeiture, should be interpreted so as to preserve the vitality of the Act and to discourage violations*

The necessary effect of reading into § 8a(5) of the Act, providing for triple forfeiture, the proviso in § 8c(14) is to enfeeble and debilitate the enforcement of this regulatory measure. Compliance by handlers with respect to a quota limitation is essential if the regulatory purpose of the Act is to be attained.¹⁹ Shipments of fruit in excess of a marketing quota, as in this case, strike at the heart of the program.

In the absence of regulation, handlers "ship excessive quantities [of navel oranges] because of [the] desires of producers to pick their fruit and thereby avoid losses through damage or deterioration in the groves. Moreover no individual handler or group of handlers successfully can increase the level of prices by reducing shipments because other handlers can

were excluded from its provisions. We are unable to say why the benefits of this statute were given" to some persons and "withheld" from others, "but the legislature having made a distinction between the cases; whether it was intentional or not, reasonable or unreasonable; the court[s] are bound by the clearly-expressed language of the act."

¹⁹ It is the declaratory purpose of the Act, *inter alia*, "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices" as defined in the statute. 7 U.S.C. 1952 ed. § 602(1).

nullify such action by increasing their shipments accordingly.”²⁰ 18 F.R. 4710. Marketing quotas are “needed to effectuate the declared policy of the Act

²⁰ These findings were made by the Secretary on the basis of the evidence adduced at the public hearing on the proposed Order Regulating the Handling of Navel Oranges Grown in Arizona and a Designated Part of California. The findings carry a presumption of the existence of adequate evidence to support the administrative action. *United States v. Rock Royal Co-op.*, 307 U.S. 533, 567–568. See also, *Niagara Hudson Corp. v. Leventritt*, 340 U.S. 336, 340. No issue arises, in this enforcement action, relative to the validity of the findings, the validity of the order, or the validity of the marketing quotas (R. 100–102). A petition under § 8c(15)(A) of the Act, with judicial review available under § 8c(15)(B), is the exclusive method for challenging the validity of an order, a provision of an order, or an obligation imposed in connection therewith. *United States v. Ruzicka*, 329 U.S. 287, 292–293; *Panno v. United States*, 203 F. 2d 504, 508–509 (C.A. 9); *United States v. Turner Dairy Co.*, 166 F. 2d 1, 3–5 (C.A. 7), certiorari denied, 335 U.S. 813; *La Verne Co-op Citrus Ass’n v. United States*, 143 F. 2d 415, 418 (C.A. 9); *Benson v. Schofield*, 236 F. 2d 719, 722 (C.A. D.C.), certiorari denied, 352 U.S. 976; *United States v. Ideal Farms, Inc.*, 262 F. 2d 334, 334–335 (C.A. 3). A handler who has filed a petition under § 8c(15)(A) may, in appropriate circumstances, obtain interim relief by filing, with the Hearing Clerk, an application to the Secretary “for an order postponing the effective date of, or suspending the application of, the marketing order or any provision thereof, or any obligation imposed in connection therewith, pending final determination of the proceeding” under § 8c(15)(A). 7 CFR § 900.70. Hence a handler may promptly obtain an administrative review of his contention that an obligation imposed on him is illegal, and judicial review is available. 5 U.S.C. 1952 ed. § 1009(c) and (d); 7 U.S.C. 1952 ed. § 608c(15)(B); 28 U.S.C. 1952 ed. § 1337. In the case at bar, there was no appeal, for judicial review, from the decision of the administrative agency holding that the petition under § 8c(15)(A) is without merit and that the quotas are valid (R. 28, 63–64, 88, 100–102, 331–348).

by establishing orderly marketing conditions for navel oranges * * * through providing a means of limiting the quantity of such oranges that may be shipped each week to commercial fresh channels." *Ibid.*

The susceptibility of perishable agricultural commodities to sharp price fluctuations caused by changes in supply is well recognized. Waite & Trelogan, *Agricultural Market Prices* (2d ed. 1951), pp. 144, 226; Thomsen, *Agricultural Marketing* (1951 ed.), pp. 191-199; Wilcox and Cochrane, *Economics of American Agriculture* (1951 ed.), p. 343; *Marketing, 1954 Yearbook of Agriculture* (United States Department of Agriculture), pp. 338-340; *Agriculture Yearbook 1925* (United States Department of Agriculture), pp. 14, 671. "[T]emporary gluts of a few days' duration may occur in individual terminals so that certain shippers, wholesalers, and retailers will incur considerable losses on particular shipments and purchases." *Marketing, 1954 Yearbook of Agriculture* (United States Department of Agriculture), p. 340. "Maladjustments of market supplies in terminal markets cause erratic price changes which are passed back to producers. The fruit industries, because of the perennial nature of the producing plant and the effect of weather upon supplies in a particular season, experience a most difficult task in tailoring the volume and composition of their available supplies to fit the demands of the consumers." *Id.* at p. 360. In short, the pricing process for agricultural commodities "calls for many delicate adjustments." Thomsen, *Agricultural Marketing* (1951 ed.), p. 82. See also, *The California Fruit Growers Exchange System* (Farm Credit

unstabilized marketing conditions respecting such commerce which have injured and burdened the orange industry, and to defeat the policy of Congress, declared in the act, to promote the orderly exchange of commodities among the several states of the United States and with foreign nations.”

If a handler ships in excess of his prorata share, equities are no longer maintained. Other growers and handlers are, in effect, penalized for his actions. While other growers and handlers divert available supplies of navel oranges in excess of the current market requirements so as to create a desired supply and price situation in the fresh market, the violating member of the industry capitalizes on a favorable marketing situation which was created by the joint action of all other industry participants. This inequity, as to complying growers and handlers, is especially severe in the case of navel oranges inasmuch as a large portion of the available supplies in excess of weekly restrictions are diverted to by-products, a far less desirable outlet from the standpoint of price-returns to the grower. For example, the equivalent on-tree returns to growers of California navel oranges from the processing outlet, during the month of April 1956, averaged 6 cents per box as compared to \$2.84 per box from the fresh market. *Agricultural Prices-Citrus* (October 1957, Supplement No. 2, Crop Reporting Board, Agricultural Marketing Service, United States Department of Agriculture), p. 8.²²

²² Judicial notice may be taken of the official statistics of the Crop Reporting Board in the United States Department of

The penalties provided in the Act are to deter handlers from exceeding their quotas or allotments.²³ The civil penalties imposed in § 8a(5) of the Act are, in the main, substantial, and without this sanction—in its full import, as written in § 8a(5)—effective enforcement is gravely impaired.²⁴ The statute in this case is remedial legislation and, therefore, its “language should be given hospitable scope.”²⁵ A regulatory statute should be interpreted so that its effectiveness will not be impaired, and if possible an interpretation should be adopted which “will preserve the vitality of the Act and the utility of the language * * *.” *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 392. See also, *Shapiro v. United States*, 335 U.S. 1, 31. Remedial provisions should be liber-

Agriculture. *Parker v. Brown*, 317 U.S. 341, 363; *Colonial Airlines v. Janas*, 202 F. 2d 914, 919, fn. 1 (C.A. 2); *United States v. Rice*, 176 F. 2d 373, 374, fn. 3 (C.A. 3).

²³ “Congress may impose penalties in aid of the exercise of any of its enumerated powers.” *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 393. It is “a now familiar type of legislation whereby penalties serve as effective means of regulation.” *United States v. Dotterweich*, 320 U.S. 277, 280–281. See also, *Rodgers v. United States*, 332 U.S. 371, 374–375; *Helvering v. Mitchell*, 303 U.S. 391, 399–400.

²⁴ A fine of \$50 to \$500 under § 8c(14) of the Act is manifestly inadequate as the only enforcement measure. Under the decision of the District Court, however, the defendants in subsequent cases may rely on advice of counsel similar to that in this case and thereby escape liability under § 8a(5).

²⁵ The quotation is from *Black v. Magnolia Liquor Co.*, 355 U.S. 24, 26, in which it was held that the “Court [of Appeals] was constrained to read the [Federal Alcohol Administration] Act narrowly, as it conceived it to be penal in nature when it forfeited a permit to do business. But we deal here with remedial legislation whose language should be given hospitable scope.”

ally construed to achieve the congressional purpose. *McDonald v. Thompson*, 305 U.S. 263, 266; *Republic Aviation Corporation v. Lowe*, 164 F. 2d 18, 20 (C.A. 2), certiorari denied, 333 U.S. 845. "Remedial statutes should be liberally construed and should be interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers." *Scarborough v. Atlantic Coast Line R. Co.*, 178 F. 2d 253, 258 (C.A. 4), certiorari denied, 339 U.S. 919. See also, *Piedmont & Northern Ry. v. Comm'n*, 286 U.S. 299, 311-312; *Adler v. Northern Hotel Co.*, 175 F. 2d 619, 620-621 (C.A. 7).

B. A violation is "willful" under § 8a(5) of the Act if a handler intentionally ships oranges and knows, at the time of shipment, that the shipment is in excess of his quota or allotment. Reliance by the defendants on erroneous advice does not exempt them from liability for civil penalties under § 8a(5) of the Act

The defendants admittedly shipped navel oranges in excess of their quotas and, admittedly, the defendants knew that the shipments were in excess of their quotas (R. 24, 33-34, 83-91, 99, 154, 159-160). It is our purpose to show in this part of our brief that the defendants "willfully" exceeded their quotas within the meaning of § 8a(5) of the Act irrespective of whether they had an evil motive or knew that their shipments were illegal.

Although the District Court found (R. 90-91) that the defendants did not "willfully" ship fruit in excess of their quotas, the so-called "finding" is a conclusional or ultimate finding. An appellate court is free to formulate its independent judgment where, as here, the finding is an ultimate finding (*Stevenot v.*

Norberg, 210 F. 2d 615, 619 (C.A. 9); *Lehmann v. Acheson*, 206 F. 2d 592, 594 (C.A. 3)); involves a conclusion of law (*ibid*; *Himmel Bros. Co. v. Serrick Corp.*, 122 F. 2d 740, 742 (C.A. 7)); is induced by an error of law (*Atlantic & P. Tea Co. v. Supermarket Corp.*, 340 U.S. 147, 149–154; *Smallfield v. Home Ins. Co. of N.Y.*, 244 F. 2d 337, 341 (C.A. 9); *Magidson v. Duggan*, 212 F. 2d 748, 752 (C.A. 8), certiorari denied, 348 U.S. 883); is a determination of a mixed question of law and fact (*Fritz v. Jarecki*, 189 F. 2d 445, 448 (C.A. 7); *Noble Co. v. C. S. Johnson Co.*, 241 F. 2d 469, 475–476 (C.A. 7)); and is based on a stipulation of facts and undisputed evidence (*Kostelac v. United States*, 247 F. 2d 723, 726, fns. 1 and 3 (C.A. 9); *General Casualty Co. v. School District No. 5*, 233 F. 2d 526, 528 (C.A. 9); *Kwikset Locks v. Hillgren*, 210 F. 2d 483, 488–489 (C.A. 9), certiorari denied, 347 U.S. 989 and 348 U.S. 855; *Orvis v. Higgins*, 180 F. 2d 537, 539 (C.A. 2), certiorari denied, 340 U.S. 810; *Smith v. Royal Ins. Co.*, 125 F. 2d 222, 224 (C.A. 9), certiorari denied, 316 U.S. 695; *Equitable Life Assurance Soc. v. Irelan*, 123 F. 2d 462, 464 (C.A. 9); *Carter Oil Co. v. McQuigg*, 112 F. 2d 275, 279 (C.A. 7)). It is necessary, therefore, for us to give full consideration to the meaning of the word “willfully” as used in § 8a(5) of the Act.

The term “willfully” is a word “of many meanings, its construction often being influenced by its context” (*Spies v. United States*, 317 U.S. 492, 497), and in some statutes the term includes the element of evil motive or knowledge that the action is illegal. For example, “in view of our traditional aversion to im-

prisonment for debt, we would not without the clearest manifestation of congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability," is a willful violation subjecting the person to imprisonment. *Spies v. United States*, *supra*, 317 U.S. at 498. But as we have shown, *supra*, pp. 43-50, the term "willfully," at issue in this case, is used in remedial legislation, and should be liberally interpreted so as to deter violations.²⁶ With respect to statutory provisions similar to those in the Act involved in this case, the courts have held that a person who intentionally acts in a manner prohibited by the statute is a "willful" violator and proof is not necessary with respect to evil motive or knowledge that the action was illegal. Some of those decisions, apposite here, are referred to in the remainder of this subsection of our brief.

It was held in *Trenton Chemical Co. v. United States*, 201 F. 2d 776, 777-780 (C.A. 6), certiorari denied, 345 U.S. 994, that a Company, which exceeded its quota under a regulatory order establishing quotas as to grain used by distillers, "willfully" violated the quota restriction, subjecting it to criminal prosecution, inasmuch as it used grain in excess of its quota and had knowledge of the regulations and knowledge that the use of the grain was in excess of its quota.

²⁶ Even a penal statute is not to be interpreted so as to give to it the "narrowest meaning." It is sufficient if the words are given their fair meaning in accord with the evident intent of Congress." *United States v. Raynor*, 302 U.S. 540, 552. See also, *Rainwater v. United States*, 356 U.S. 590, 592-593; *State of Colorado v. United States*, 219 F. 2d 474, 476 (C.A. 10).

The defendant contended that it used grain products, not grain, and "that it had been advised by its attorney that it was not illegal to use grain products in its distilling operations," but the "District Judge declined to permit the * * * [Company] to show at the trial that it acted in good faith and on advice of counsel that its acts were not illegal, in using the materials in question" (201 F. 2d at 778, 779). In sustaining the judgment of the District Court, the Court of Appeals held that inasmuch as the regulatory statute did not proscribe acts "in themselves wrong," evidence of "bad faith or evil purpose on the part of the defendant was not necessary to constitute a violation of the act, but it was sufficient if the prohibited act was intentional or voluntary" (201 F. 2d at 780).

Similarly, in *United States v. Perplies*, 165 F. 2d 874, 876 (C.A. 7), the Court held that a violation of the Emergency Price Control Act was "willful" if the "failure to comply with the regulation was intentional and deliberate and not merely by inadvertence or mistake" inasmuch as the offense did not involve moral turpitude. The same result was reached in an action for a violation of ceiling prices under the Defense Production Act of 1950 in *Nicastro v. United States*, 206 F. 2d 89, 92 (C.A. 10).²⁷

²⁷ In the *Nicastro* case, *supra*, in order to reduce the amount of the judgment, the burden was on the defendant—by the express terms of the Act—to prove that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. 206 F. 2d at 90, fn. 1. The reference in the Court's opinion, 206 F. 2d at 92, to the failure to seek legal advice relates to whether

In *Chicago, St. P.M. & O. Ry. Co. v. United States*, 162 Fed. 835, 840-842 (C.A. 8), certiorari denied, 212 U.S. 579, the Court upheld the conviction of the defendants under the Elkins Act on the ground that they "willfully" granted rebates to a shipper, notwithstanding the reliance by the defendants on decisions by the Interstate Commerce Commission which, according to the Court, "might well have afforded ground for belief by defendants that their act * * * was justifiable and lawful" (162 Fed. at 840-841). Specifically, the Court said that to "hold that the belief of an individual concerning the legality of his action should constitute a standard of innocence or guilt would establish an uncertain and dangerous doctrine. It would in many cases justify a violation of statutes expressive of public policy concerning which there may obviously be and frequently are as many different opinions as there are different individuals affected by them" (*Id.* at 842).²⁸ See also, *Armour Packing Co. v. United States*, 209 U.S. 56, 70-71, 85-86; and *United States v. Union Pac. R. Co.*, 169 Fed. 65, 67 (C.A. 8).

In a case involving an offense *malum prohibitum*, as contradistinguished from an offense *malum in se*, bad intent or evil motive is not an attribute of liability on a charge of having "willfully" violated the statute. *Riss & Company v. United States*, 262 F. 2d 245, 247-251 (C.A. 8). Elaborate precautions against a viola-

the defendant took practicable precaution against the occurrence of the violation, and not as to whether the offense was willful. *Ibid.*

²⁸ This case was relied on by the Court in *Riss & Company v. United States*, 262 F. 2d 245, 248 (C.A. 8).

tion of the statute are not sufficient as a defense. *Ibid.* A corporation or a partnership may be adjudged guilty, in a criminal proceeding, of "willfully" violating the statute because its employees or agents failed to comply with the employer's "elaborate and comprehensive program designed to insure compliance" with the law. *Ibid.*

The word willful, "even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law." *American Surety Co. v. Sullivan*, 7 F. 2d 605, 606 (C.A. 2), opinion by Judge Learned Hand. The Court recognized in *Browder v. United States*, 312 U.S. 335, 342, that "the word 'willful' often denotes an intentional as distinguished from an accidental act," and the Court held that a person who procures a passport by reason of a false statement, and uses the passport to prove citizenship on reentry to this country, is properly convicted under the criminal statute prohibiting a person from "willfully and knowingly" using the passport (312 U.S. at 336-342). The Court rejected the defendant's contention that inasmuch as the use of a passport is not required of citizens on reentry, and that because he had "no ulterior evil purpose in mind," his use of the passport was not a "willful" use, within the meaning of the statute. *Ibid.* Specifically, the Court held that "[o]nce the basic wrong under this passport statute is completed, that is the securing of a passport by a false statement, any intentional use of that passport" is willful. 312 U.S. at 342.

Similarly, in *Fields v. United States*, 164 F. 2d 97, 99-101 (C.A.D.C.), certiorari denied, 332 U.S. 851, in sustaining the defendant's conviction under the criminal statute relating to a "willful" failure to furnish records to a congressional committee, it was held that the word "willful" does not mean that the refusal to comply with the order of the committee must be for an evil or a bad purpose, and that the "reason or the purpose of failure to comply or refusal to comply is immaterial, so long as the refusal was deliberate and intentional and was not a mere inadvertence or an accident." The rationale of the *Fields* case was applied in the similar case of *Dennis v. United States*, 171 F. 2d 986, 990-991 (C.A.D.C.), affirmed on other grounds, 339 U.S. 162, and the Court held in the *Dennis* case, in addition, that the mere fact that the defendant claimed to have followed the advice of counsel "is no defense. If it were, many corporations, organizations and even individuals would maintain counsel permanently for the purpose of advising them against doing anything that they do not wish to do" (171 F. 2d at 991).

In *United States v. Gris*, 247 F. 2d 860, 864 (C.A. 2), the defendant was convicted of "willfully and knowingly" intercepting and divulging telephone communications in violation of the Federal Communications Act. The conviction was affirmed notwithstanding the defendant's contention that he was tapping the telephone of a client's wife, on behalf of the client, and that it is not a violation of the State law for a subscriber to tap his own line (247 F. 2d at 864). The Court held: "It matters not whether

appellant realized his conduct was unlawful. He knew exactly what he was doing; and what he did was a violation of the Federal Communications Act. He intended to do what he did, and that is sufficient.” *Ibid.*

The decisional law supports our interpretation of the word “willfully” in § 8a(5) of the Act, and if the regulatory program is to be effective it is necessary that the term “willfully” be interpreted in accordance with the decisions to which we have referred. As we have shown, *supra*, pp. 43-50, the success of the program is dependent upon effective enforcement. The regulatory features of the program necessarily impose restrictions on the regulated groups, and it is likely that a handler in some area will, from time to time, feel that the incidence of the regulation on him is more severe than on others.²⁹ Whenever surplus fruit must be disposed of for less than could be obtained in the fresh fruit market some handlers may seek to ship their excess fruit to the fresh fruit market, and they may endeavor to obtain advice which would permit the desired shipment of fruit. If the Government must prove, in an action under § 8a(5), not only that the handler intentionally shipped fruit, knowing that the shipment was in excess of his quota, but also that the handler had an evil motive or knew that he was violating the law, the remedial purpose of the Act will be thwarted.³⁰ The remedial measure

²⁹ See, e.g., *Secretary of Agriculture v. Central Roig Co.*, 338 U.S. 604, 618, in which it was argued that certain sugar quotas were unfair and “disadvantageous to certain areas or persons.”

³⁰ Here, as in *Woolford Realty Co. v. Rose*, 286 U.S. 319, 330, the mind rebels against an interpretation which would foster

is not to be given a devitalizing interpretation, *supra*, pp. 49-50.

C. Assuming, *arguendo*, that the filing of an administrative petition under § 8c(15)(A) of the Act, "in good faith and not for delay," or that reliance, in good faith, on erroneous advice is a bar to an action for civil penalties under § 8a(5) of the Act, nonetheless the defendants are, on the basis of the admitted facts in this case, liable for civil penalties under § 8a(5)

Assuming, *arguendo*, that our interpretations of the Act, *supra*, pp. 33-58, are erroneous, nonetheless the undisputed facts show that the defendants willfully shipped oranges on April 7 and 8, 1956, in excess of their allotments and are liable for civil penalties under § 8a(5).

The proviso in § 8c(14) is, by its terms, applicable only if the petition under § 8c(15)(A) is "filed and prosecuted by the defendant in good faith and not for delay * * *." 7 U.S.C. 1952 ed. § 608c(14). The criterion of "good faith," in a statutory provision which relieves a person from liability if his conduct is in good faith, includes "not only personal upright mental attitude and clear conscience, but also intention to observe legal duties." *Kiyoichi Fujikawa v. Sunrise Soda Water Works Co.*, 158 F. 2d 490, 494 (C.A. 9), certiorari denied, 331 U.S. 832. The proviso in § 8c(14) of the Act contains conjunctive conditions, *viz.*, "in good faith and not for delay." The stipulation of facts and the undisputed evidence in the record in the case at bar show that the petition under § 8c(15)(A) was not filed in good faith and, also, that it was filed for delay.³¹

the opportunity of evasion. "Expediency may tip the scales when arguments are nicely balanced." *Ibid.*

³¹ The proviso in § 8c(14) should not be interpreted so as to enable violators to escape all penalties by merely filing a peti-

Mr. Woodall, Sales Manager of Lo Bue Brothers, told the Navel Orange Administrative Committee on March 29 that he "intended to move his fruit, to ship his fruit in one way or another, and he would find some way to do it" (R. 146). The manager of the Administrative Committee testified that "I told him * * * he must understand it was my job [as manager] to catch him if he shipped in excess of the allotment, and he said, 'Well, I ain't going to tell you what I am going to do' " (R. 154).

Mr. Woodall then consulted with an attorney, G. V. Weikert, Esq., and received the advice that if a petition under § 8c(15)(A) is filed "in good faith," the quota or allotment complained of is, in effect, suspended until there is a decision on the petition, and the handler is exempted from the penalties prescribed by the Act (R. 182). However, the undisputed evidence shows that the petition under § 8c(15)(A) was filed only for the purpose of permitting the defendants to ship their excess fruit (R. 106, 109-113, 117-123, 141-143, 145-155). Specifically, Mr. Mario Lo Bue (the managing partner in the defendant business concern) testified that the "only" reason for filing the administrative petition under § 8c(15)(A) was "because the fruit was going bad" (R. 121).

After the excess shipments were completed by the defendants, little interest was shown by the defendants with respect to the petition for administrative

tion under § 8c(15)(A) although the grounds in such a petition are without substantial merit. See, e.g., *Provident Mut. Life Ins. Co. v. University Ev. L. Church*, 90 F. 2d 992, 995 (C.A. 9), quoting from *In re Tennessee Pub. Co.*, 81 F. 2d 463, 466 (C.A. 6), affirmed on other grounds, 299 U.S. 18.

review under § 8c(15)(A) of the Act. Mr. Woodall did not remember whether he saw or communicated with Mr. Weikert during the period from the filing of the petition for administrative review to the time of the hearing (R. 174-178). The decision on the administrative petition was adverse to the defendants (R. 88, 331-348). It was held by the Judicial Officer,³² in dismissing the petition under § 8c(15)(A), that the contested regulations were "reasonable" (R. 343), that the quotas "reflected the particular conditions prevailing in the area" (R. 343), and that the "restrictions imposed were instrumental in attaining excellent returns to growers for the 1955-1956 crop" (R. 344), and there was "no evidence of discrimination against petitioner [*i.e.*, Lo Bue Brothers] in the record" (R. 345). "In fact, petitioner [*i.e.*, Lo Bue Brothers] marketed almost five percent more of its 1955-1956 crop in fresh fruit channels than the average marketed by handlers and producers from Southern California," in that marketing season, and also marketed a higher percentage of its navel oranges "in fresh market channels than the average marketed by handlers in Central California" (R. 345). "[A]ny price differential between Southern and Central California navel oranges appears to have resulted from the characteristics of the two crops rather than the time of marketing of the respective crops" (R. 345-346).

Although the proceeding on the petition under

³² The Judicial Officer acted for the Secretary of Agriculture pursuant to authority delegated to the Judicial Officer. 10 F.R. 13769; 11 F.R. 177A-233; 18 F.R. 3219, 3348; 19 F.R. 74.

§ 8c(15)(A) was not moot as a matter of law,³³ no appeal was taken from the administrative decision (R. 28). The petition under § 8c(15)(A) was, allegedly, for the purpose of obtaining permanent relief from the administrative action alleged to be illegal, *viz.*, the regulation of the shipments of navel oranges "beyond their historical life" (R. 26-27, 333-334), and the prayer in the petition was, *inter alia*, that the regulatory order be modified so "as to prevent a repetition in the future of the situation complained of * * *" (R. 27). But on April 19, 1956, only 10 days after the petition under § 8c(15)(A) was filed and prior to the hearing on the petition, "a consent decree" was entered in District Court "for [a] permanent injunction enjoining them [*i.e.*, the defendants]"

³³ A proceeding to review an administrative rule or order, which administrative action is of such short duration that it expires before the review proceeding is terminated, is not moot if the legal issue involved is relevant in the future administration of the program. *Federal Trade Comm'n v. Goodyear Co.*, 304 U.S. 257, 259-260; *Panama Refining Co. v. Ryan*, 293 U.S. 388, 413-414; *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 514-516; *Gay Union Corp. v. Wallace*, 112 F. 2d 192, 195 (C.A.D.C.), certiorari denied, 310 U.S. 647; *Boise City Irr. & Land Co. v. Clark*, 131 Fed. 415, 418-419 (C.A. 9). See, *e.g.*, *Secretary of Agriculture v. Central Roig Co.*, 338 U.S. 604, in which the Court in 1950 passed on the validity of the 1948 sugar quotas. Moreover the shipments in excess of the quotas, in the case at bar, subjected the defendants to suit for civil penalties, and if the quotas were illegal that contention could be advanced by the defendants only by means of an appeal under § 8c(15)(B) of the Act from the decision of the Judicial Officer pursuant to § 8c(15)(A). See, *supra*, fn. 20, p. 44. The Judicial Officer, in disposing of the petition under § 8c(15)(A), held that the proceeding is not moot (R. 339-340).

from violating the regulatory order or regulations properly issued pursuant thereto (R. 28, 88-89).

In the circumstances, it is plain that, as Mr. Lo Bue testified, the "only" purpose of filing the petition for administrative review was "because the fruit was going bad" (R. 121), and the defendants wanted to ship the excess fruit (R. 106-122). In addition, the circumstances with respect to the failure to be sure that the petition for administrative review had been "filed" on Friday, April 6, is indicative of the defendants' resolute determination to ship their excess fruit on the weekend of April 7 and 8 irrespective of whether they were in compliance with the law.

The time pattern of the relevant circumstances is evincive of the defendants' intention to ship their excess fruit irrespective of the applicable quotas. The administrative petition was mailed in Los Angeles on Thursday, April 5 (R. 25, 85), and obviously it could not have been received and filed in Washington, D.C., until at least a day or two later. It was not, however, sent by air-mail, special delivery, but by registered air mail (R. 35, 85). It is "general knowledge" that "registered mail * * * is not always delivered so promptly as is the case with ordinary mail." *Weaver v. United States*, 72 F. 2d 20, 21 (C.A. 4). Mr. Lo Bue was advised by Mr. Weikert that he "would probably be served an injunction" (R. 108), but Mr. Lo Bue did not expect the injunction to be served during the weekend of April 7 and 8, when the excess shipments involved in this case were made (R. 118-120). Twenty-three of the excess shipments involved in this case occurred

on Saturday, April 7, shortly after midnight, and the three remaining shipments occurred on Sunday, April 8, shortly after midnight (R. 33-34, 108-110). Sales had previously been made with respect to the navel oranges in only two of the excess shipments, and the other 24 shipments were started in transit unsold (R. 110-111).

Assuming, *arguendo*, the relevancy of the exemption in § 8c(14) of the Act, relied on by the defendants, the exemption is applicable only to such violations “as occurred between the date upon which the defendant’s petition was filed with the Secretary, and the date upon which notice of the Secretary’s ruling thereon was given to the defendant * * *.” 7 U.S.C. 1952 ed. § 608c(14). A petition for administrative review pursuant to § 8c(15)(A) of the Act is “deemed to be filed when it is received by the [H]earing [C]lerk” in the Department in Washington, D.C. 7 CFR § 900.69(d). The regulation is decisive in this respect, but in similar situations it has been held that a paper is filed with a governmental agency when it is actually delivered to the agency, and not when it is deposited in the post office for delivery. *United States v. Lombardo*, 241 U.S. 73, 76-77; *United States v. Peters*, 220 F. 2d 544, 545 (C.A. 10); *McRae v. Woods*, 165 F. 2d 790, 790-791 (Emerg. C.A.), certiorari denied, 333 U.S. 882; *Poynor v. Commissioner of Int. Rev.*, 81 F. 2d 521, 522 (C.A. 5); *Modern Engineering Co. v. United States*, 113 F. Supp. 685, 687 (Ct. Cl.). Admittedly, however, as found by the District Court, the defendants’ petition under § 8c(15)(A) was not “filed,” *i.e.*, “received,” in the office of the Hearing

Clerk in the Department in Washington, D.C., "until in the afternoon of [Monday] April 9, 1956" (R. 87). The excess shipments, however, were made on April 7 and 8 (R. 33-34, 108-110).

Mr. Weikert made it plain, in his advice to the defendants, that the petition must be "filed" (R. 182-186). Specifically, Mr. Weikert testified that he advised the defendants that "where a 15(A) petition is filed" in good faith, the exemption from penalties is applicable (R. 182), and that the defendants could ship their oranges "only after the filing in good faith of a 15(A) petition" (R. 186). Mr. Lo Bue also testified that he was advised by Mr. Weikert that by "filing a 15(A)" the oranges could be shipped without penalty (R. 107). Similarly, Mr. Woodall testified that Mr. Weikert said that the only way to ship the fruit was by "filing" a (15)(A) petition, and that as "soon as the 15(A) petition was filed," the oranges could be shipped (R. 160). It cannot, therefore, be gainsaid that the defendants knew that the petition must be "filed" before they could begin to ship their excess oranges. In other words, the defendants knew that they would be subject to statutory penalties if the excess shipments occurred prior to the filing of the administrative petition.

The defendants knew that the petition was not mailed until Thursday, April 5 (R. 123, 186). In fact, the petition was signed by Mr. Lo Bue in Mr. Weikert's office in Los Angeles on Thursday, April 5 (R. 123, 183, 186). Hence Mr. Lo Bue knew that to be in compliance with what he had been advised was an exemption from the penalty provisions of the

Act, the administrative petition had to be filed with the Secretary on the following day to be applicable to the shipments in this case. Although Mr. Weikert advised the defendants on Friday that "by now the petition would be on file with the Secretary of Agriculture," (R. 183), the defendants knew that the petition had been mailed on Thursday, April 5, and if the defendants had wanted to know whether the administrative petition had been "filed," they could easily have verified the fact by telephone or requested Mr. Weikert to verify the fact that the petition had actually been filed with the Hearing Clerk in the Department in Washington, D.C., but no such telephone call was made (R. 186).

The additional effort or expense with respect to a verificative telephone call would have been insignificant compared with the effort and expense already undertaken by the defendants. Mr. Woodall and Mr. Lo Bue had both gone to Los Angeles to confer with Mr. Weikert and, also, they had conferred with Mr. Weikert by telephone (R. 106-107, 156-158, 181-183). In addition, they had incurred the expense of having the administrative petition prepared. The additional telephone call would have been a trivial expenditure in order to be sure that the petition was on file.³⁴

The conclusion is, we submit, inescapable that the defendants were not interested in verification with respect to whether the petition for administrative re-

³⁴ If the Department had known about the defendants' plan to ship the fruit in excess of the quotas, appropriate steps could have been taken at once to obtain a temporary restraining order in District Court.

view, under § 8c(15)(A), had been filed. The filing of the petition is the vital factor in the defendants' theory of statutory interpretation, but in this vital respect there was no effort by the defendants to ascertain whether the petition had been filed. The excess shipments were made on April 7 and 8, although the petition was not filed until April 9. These circumstances in conjunction with the other factual circumstances in the record warrant the view that the mailing of the petition was merely a maneuver or stratagem on the part of the defendants.³⁵

To be sure, the District Judge made the ultimate finding or conclusion that the defendants did not "willfully" ship oranges in excess of their quotas or allotments (R. 90-91). But the "phrase 'finding of fact' may be a summary characterization of complicated factors of varying significance for judgment. Such a 'finding of fact' may be the ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from living testimony which elude print. The conclusiveness

³⁵ The District Court states in its memorandum decision (R. 64) and in its findings of fact (R. 88) that the Judicial Officer "refused" to make any finding as to whether the defendants' petition for administrative review was filed in good faith and not for delay, but the Judicial Officer states, in his decision with respect to the administrative petition, that the "record in this proceeding contains some evidence of lack of good faith. * * * However, since we are dismissing the petition upon the merits, we do not feel it necessary also to conclude that the petition should be dismissed for lack of good faith and, therefore, no finding or conclusion is made on this part of the case insofar as this proceeding is concerned" (R. 347).

of a 'finding of fact' depends on the nature of the materials on which the finding is based. The finding even of a so-called 'subsidiary fact' may be a more or less difficult process varying according to the simplicity or subtlety of the type of 'fact' in controversy. Finding so-called ultimate 'facts' more clearly implies the application of standards of law. * * * Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court." *Baumgartner v. United States*, 322 U.S. 665, 670-671. The finding, in the case at bar, that the defendants did not "willfully" ship in excess of the quotas is a conclusional or ultimate finding, involves a determination of a mixed question of fact and law, and is based on a stipulation of facts and undisputed testimony. As we have shown, *supra*, pp. 50-51, the so-called finding as to willfulness is a matter with respect to which this Court should formulate its independent judgment.

The defendants' shipments of excess fruit were, in view of the stipulation of facts and the undisputed evidence, willful. The facts, as shown by the record, firmly support that conclusion. The factual support is so strong that if it is assumed, *arguendo*, that the ultimate finding by the lower court as to willfulness may be set aside, on appeal, only if the finding is regarded, strictly, as a finding of fact and if it is clearly erroneous, nonetheless the record warrants the setting aside of the finding. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the

definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.*, 333 U.S. 364, 395.

CONCLUSION

The judgment of the District Court should be reversed and the case remanded with directions to enter judgment for the United States in accordance with the prayer of the complaint.

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No. 16230

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff and Appellant,

vs.

LO BUE BROTHERS, a Partnership; MARIO LO BUE, FRED
LO BUE, and JOSEPH LO BUE, Partners; and WILLIAM
LUTHER WOODALL,

Defendants and Appellees.

On Appeal From the United States District Court for the
Southern District of California, Northern Division.

BRIEF FOR THE APPELLEES.

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Defendants and Appellees.

On Appeal From the United States District Court for the
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BRIEF FOR THE APPELLEES.

This brief will be in two parts. Part I is in reply to the appellant's brief. Part II is in reply to the *amicus curiae* brief of Sunkist Growers, Inc. All references to the record are to the printed Transcript of Record.

PART I.

Jurisdictional Statement.

The jurisdictional statement in appellant's brief is inaccurate in two particulars.

First, it is stated, on page 1, that the complaint was filed pursuant to 7 U.S.C. 1952ed. Sec. 608a(5)-(7) of the Agricultural Marketing Agreement Act of 1937, as

amended. The reference to "Sec. 608a(5)-(7)" embraces Sec. 608a(6), which is a provision authorizing specific enforcement and restraint against violation of orders and regulations. But jurisdiction under that subdivision was exercised and exhausted in case No. 1637-ND in which a consent decree for permanent injunction was entered against appellee Lo Bue Brothers on April 19, 1956. [R. 28.]

Second, the loose statement is made, on page 2, that the complaint alleges that the appellees ". . . 'willfully' shipped navel oranges in excess of the allotments established for the defendant Lo Bue Brothers . . . thereby subjecting the defendants to liability for three times the market value of the fruit shipped in excess of the allotments." Sec. 608a(5), however, provides only that "Any person willfully exceeding any quota or allotment fixed for him . . . shall forfeit to the United States a sum equal to three times the current market value of such excess" Nothing is said about "shipping," and the question arises whether mere shipment incurs a forfeiture in any case, or whether there must also be a sale. The significance of this in the present case will appear later in this brief.

Statement of Facts.

The Statement of Facts in appellant's brief (pp. 10-16) is not acceptable to the appellees. It is repeatedly stated in appellant's brief that most of the facts were stipulated to, and that there are no conflicts in the evidence. Furthermore, the District Court's Findings of Fact are comprehensive and detailed. [R. 78-91.] Yet by means of omissions, inaccuracies, and the quotation of fragments of testimony out of context, the appellant has succeeded in slanting its Statement of Facts against the appellees.

On page 12 of appellant's brief, it is said that the appellee William Luther Woodall, sales manager for appellee Lo Bue Brothers, "knew that the shipments were in excess of the allotments for Lo Bue Brothers." That statement is a part of an oral stipulation, the rest of which is, "but he also knew that the petition had been filed and he believed that they were exempted." [R. 99.]

Immediately following that, on page 12 of the brief, appellant states that appellees consulted an attorney "to determine how they could ship their excess fruit." In the first place, the appellees consulted an attorney regarding Lo Bue Brothers only. Mr. Woodall was not a handler or a shipper, he had no prorated base or allotments, and he was not subject to the marketing order or the regulations under it. [R. 106-108, 113, 114, 124, 126, 180, 181.] In the second place, the appellees consulted an attorney to determine whether there was any way in which Lo Bue Brothers could *legally* ship its excess fruit. [R. 106-108, 158-161, 180-182.] On page 13 of the brief, selected excerpts from the testimony of Mario Lo Bue are quoted with the evident purpose of creating the false impression that he was not concerned with the legality of his actions. [See R. 107, 108.]

Nowhere in the Statement of Facts is there any reference to the nature of Lo Bue Brothers' 15(A) petition for administrative relief, or the grounds upon which it was filed. The petition alleged, in substance, that in the year 1956, for the first time, the Navel Orange Administrative Committee was arbitrarily and unreasonably regulating and restricting the marketing of the Central California navel orange crop far beyond its historical marketing period, that it was proposing to regulate and restrict the marketing of the Southern California navel orange

crop for a substantially shorter period beyond its historical marketing season, that when this discrimination occurred Central California did not have fair or adequate representation on the Administrative Committee, and that the declared policy and purpose of the Act was thereby defeated, and Lo Bue Brothers and the growers whose fruit it marketed were thereby being deprived of their property without due process of law, and their property had been and was thereby being taken, confiscated and destroyed without compensation therefor, in violation of the Fifth Amendment to the Constitution of the United States. [R. 25-27, 85-87.]

At the bottom of page 13 and the top of page 14 of appellant's brief, the statement is made that "Mr. Lo Bue did not expect the injunction to be served during the weekend of April 7 and 8 when the excess shipments were made." The significance of this is not apparent, but the entire testimony of Mr. Lo Bue on that subject does not justify the statement quoted above. [R. 118-120.]

Next, on page 14 of its brief, the appellant quotes several fragments of testimony regarding statements made by appellee Woodall at a meeting of the Navel Orange Administrative Committee at Los Angeles in March, 1956. It does say that Mr. Woodall was "representing himself," but it does not say that Mr. Woodall is a navel orange grower, that he attended the meeting only as a grower, that he was not authorized to appear or speak for Lo Bue Brothers, and that when he spoke of this intention to find some way to ship his fruit he was referring only to his own personally owned fruit. [R. 137-143.] Neither does it say that M. D. Street, a member of the Administrative Committee, and a witness for the plaintiff, testified, "I think he was speaking principally for himself." [R. 146.]

On pages 15 and 16 of its brief the appellant undertakes to summarize the testimony of G. V. Weikert, attorney for the appellees, but leaves out important portions of that testimony. Omitted is the following:

That after hearing Mr. Woodall's statement of the facts, said attorney expressed the opinion that there was grave doubt as to the legality of the Committee's action, and that the only thing that could be done was to follow the administrative procedure outlined in the Act, which consisted of filing what is known as a 15(A) petition. [R. 181.]

That said attorney also told Mr. Woodall that in the only cases he knew of, which were two cases decided in the District Court at Los Angeles in 1944, which had never been appealed and had become final, the immunity provided by the Act during the pendency of a 15(A) petition filed in good faith had been construed to extend to civil penalties as well as criminal penalties. [R. 182.]

That said attorney testified that he has had frequent communications over the years with departments and agencies of the federal government in Washington, and also with many individuals in Washington, D. C., and it has been his experience that airmail deposited in the mail at Los Angeles one day is delivered invariably in Washington to the addressee the next day. [R. 183.]

That said attorney testified that he had no knowledge as to the manner in which mail for the Department of Agriculture is handled in Washington, and had no knowledge of any alleged practice of holding mail for the Department of Agriculture received on a Friday after 2:00 p. m. until the following Monday,

and had no knowledge that the entire Department of Agriculture is closed all day Saturday. [R. 183.] That said attorney testified that in the preceding twenty years his practice, to a very considerable extent, has dealt with cases arising out of the activities of the Department of Agriculture, and that he has specialized in agricultural marketing, and the fruit and produce business and its problems generally. [R. 186.]

That said attorney testified that over the years he has prepared and filed quite a number of 15(A) petitions for various shippers, raising various legal questions with regard to various marketing orders, not only with regard to oranges, but also lemons and other commodities, although this is the only one he has filed on this particular marketing order. [R. 184.]

That said attorney testified that it has been his experience in filing 15(A) petitions that they were delivered in Washington the next day, that he has never telephoned the hearing clerk's office in Washington to see whether a petition was on file, and he did not do so on this occasion. [R. 184, 186.]

That said attorney further testified that this 15(A) petition was filed for the purpose of obtaining a ruling upon what he believed to be a unique, substantial and meritorious question of law, based upon a very substantial complaint and injury, and that he advised the petitioners that they had every right to avail themselves of the privilege given them by the Congress in this legislation of disregarding the allotment until and unless they were enjoined. [R.187.]

In the last paragraph of the Statement of Facts, on page 16 of appellant's brief, it is said that the administra-

tive hearing on Lo Bue Brothers' 15(A) petition was held on June 14, 1956, and that Mr. Woodall (who was not a petitioner) testified that he does not remember whether he saw or communicated with Mr. Weikert during the period from the filing of the petition to the date of hearing. It is not stated that appellant's counsel did not ask that same question of Mr. Mario Lo Bue, who was a petitioner. [R. 113-127.]

In the same paragraph, on page 16 of the brief, appellant says that the decision on the administrative petition was adverse to the defendants, and no appeal was taken from the administrative decision. Appellant does not say that after the hearing on June 14, 1956 a brief was filed on behalf of the petitioners, Lo Bue Brothers, that the hearing examiner issued a report containing proposed findings of fact and conclusions on September 28, 1956, that written exceptions to this report were filed by Lo Bue Brothers, and that it was not until December 3, 1956 that the Judicial Officer of the Department of Agriculture issued his decision and order denying relief and dismissing the petition. [R. 28, 88.]

The following facts are omitted entirely from the appellant's Statement of Facts:

(a) The navel oranges in the 26 shipments involved in this case were owned by some 15 or 18 growers, and were handled by Lo Bue Brothers on consignment, as the agent of those growers. [R. 129, 130-132, 84.]

(b) While Lo Bue Brothers received from the sale of two of said shipments, which were sold before April 9, 1956, the gross sum of \$3,520.75, and received from the ultimate sale of the remaining 24

shipments, after that date, the gross sum of \$46,349.99, it paid to the growers who owned the fruit the net sum of approximately \$29,000.00, the difference going to cover the cost of picking, hauling, handling, loading, shipping and selling the fruit, and the net sum of money received by Lo Bue Brothers as compensation for handling said fruit amounted to approximately \$1,800.00. [R. 111, 112, 84.]

(c) Mario Lo Bue, the managing partner of Lo Bue Brothers, testified that he relied completely upon the advice received from his attorney, that when he made the shipments in question he did not believe that he was violating any law, order, or allotment, and that he would not have made these shipments if he had felt that by doing so he was guilty of any kind of violation. [R. 105, 107, 89, 90, 91.]

Judgment of the District Court.

Under the above heading, on pages 16 and 17 of its brief, the appellant undertakes to epitomize the decision and judgment of the District Court, and to state “specifically” what the Court concluded. In so doing it telescopes the Court’s decision and findings far too much.

In its Memorandum of Decision the District Court discussed in detail the three prior decisions construing Section 608a(5) and 608c(14) of the Act, all in the Southern District of California, all final, and all holding that the filing in good faith of a 15(A) petition exempts the petitioner from all penalties under the Act, civil and criminal alike. [R. 65-67.] The Memorandum Decision goes on to say this:

“Counsel for the plaintiff state that the three cases above noted, decided by Judge Hollzer, are the

only cases which have construed the proviso contained in Section 608(c)(14). My research has failed to disclose any other decisions on the subject rendered by any United States court.” [R. 70, 71.]

The District Court did conclude “specifically,” as appellants says, that the excess shipments were not “willful” because the appellees relied on the advice of their attorney that the filing of a 15(A) petition would exempt them from civil liability as well as from a fine, and that their petition “would be on file with the Secretary of Agriculture” on April 6, and they could begin the next day to make shipments in excess of their allotments. But that is not all. The District Court also concluded, “specifically,” in its Memorandum Decision that:

“It is my view that the acts of the defendants cannot be characterized as ‘wilful.’ They consulted a reputable attorney who had had extensive experience under laws administered by the Department of Agriculture. His advice was based upon the only Court decisions which had been rendered construing the proviso in Section 608(c)(14) of Title 7 U.S.C. His advice was in accordance with such decisions. Before shipments were made by the defendants in excess of their quota, the attorney telephoned them that the ‘15-A’ petition had been filed, and that they could ship under the immunity provided by that same section. The defendants, in my opinion, in good faith, relied upon the advice and information furnished them by their attorney. The defendants, therefore, are entitled to have judgment entered in their favor.” [R. 71, 72.]

And the District Court made specific findings in accordance with its Memorandum Decision. It also found as follows:

“Said attorney also truthfully informed the defendants that his past experience had established the fact that petitions of this kind air mailed by him from Los Angeles, California to the Secretary of Agriculture at Washington, D. C. were received and filed the next day.” [R. 90.]

* * * * *

“That the defendants accepted and believed the said advice and information given them by their said attorney, and defendant Lo Bue Brothers acted in good faith in reliance thereon in filing said petition with the Secretary of Agriculture and in making said twenty-six shipments of navel oranges in excess of its allotments on April 7, 1956 and April 8, 1956, and in so doing defendant Lo Bue Brothers exercised ordinary and reasonable care and caution to avoid violating Order No. 14, and did not knowingly, intentionally, or wilfully exceed its allotments thereunder.” [R. 90, 91.]

Summary of Argument.

Only one question is raised by this appeal, but in the appellant's brief it is all but swallowed up in a sea of repetitious words. The one question is whether, under the undisputed facts of this case, the appellee Lo Bue Brothers exceeded any quota or allotment fixed for it under Order No. 14 by the Secretary of Agriculture “willfully,” within the meaning of Section 608a(5) of the Act.

There are many other questions and issues which *might* have arisen, had the decision of the District Court been different, such as the following:

Does the exemption provided in Sec. 608c(14) of the Act apply to civil penalties as well as to criminal fines?

In any case, is an individual, employed as sales manager, personally subject to civil penalties for violations of his employer, in addition to the penalties imposed upon the employer?

If such employee is personally subject to such penalties, then is not the broker who actually made the sales in excess of allotments also liable for civil penalties?

Does the mere loading and shipping in a car or truck of fruit in excess of allotment, which might never be sold, subject the shipper to civil penalties in any case, or must the fruit be actually sold and thereby entered into the channels of trade?

What is meant by the provision in Sec. 608a(5) of the Act that one who willfully exceeds his quota or allotment shall forfeit a sum equal to three times the current market value of such excess?

Does "current market value" mean the value of the fruit on the trees, or when it is received at the packing house, or after it has been packed, or after it has been loaded on cars or trucks, or after it has arrived at some distant destination? The fruit could be marketed at any one of those stages, and it has a different market value at each of them because, for one reason, they all involve different costs and charges. Which "market value" is meant in the Section?

Does it not follow, in any case, that the fruit must be actually sold, at some stage of its handling, before its "current market value" can be determined?

Does the expression "current market value" refer to the value of the fruit to its owner, or its value to the shipper who handles it as agent for the owner?

If, for instance, the shipper actually receives and retains no more than \$1800.00 out of the total amount ultimately received from the sale of all fruit shipped in excess of allotment, and actually receives and retains no more than \$130.00 from the fruit in excess of allotment sold at time of shipment, do not those figures represent the "current market value" of the fruit to the shipper?

Can anyone "forfeit" anything he has never had and is not entitled to receive?

None of the foregoing moot questions was considered or passed upon by the District Court, for the reason that none of them was involved in the case, under the view taken of it by that Court. And the appellant has not mentioned any of those moot questions in its brief, with the exception of the first one, that is, whether the exemption afforded a 15(A) petitioner extends to civil as well as criminal penalties. That one the appellant discusses repeatedly and at great length, although it has no bearing whatever upon the decision and judgment from which this appeal is taken. The appellees do not propose to be drawn into a lengthy and detailed argument on any moot question, but some comment will be made upon the subject of exemption after the real issue in the appeal has been discussed.

ARGUMENT.

Appellees Did Not Willfully Exceed Any Allotment.

The essential facts in this case are undisputed. They are concisely summarized in the District Court's Memorandum Decision [R. 63-72] and they are set forth in full detail in the Court's Findings of Fact. [R. 78-91.] The only question raised by this appeal is whether, on those facts, appellee Lo Bue Brothers "willfully" exceeded any quota or allotment fixed for it by the Secretary of Agriculture, within the meaning of Sec. 608a(5) of the Act. This question, of course, turns upon the meaning and application of the word "willfully" as used therein.

This subject is discussed in 94 *Corpus Juris Secundum*. At pages 620 and 621, it is said:

"The words 'willful' and 'willfully' are of familiar use in every branch of the law, being commonly employed in averring or describing an act, or in denoting the quality of an act, or in describing the intent with which an act is done; and when so used the terms imply the ability to do the act described.

"'Willful' and 'willfully' have various meanings, are susceptible of different shades of meaning or degrees of intensity, and are used in different senses in different connections, and generally their signification will depend on the context in which they appear, the nature of the subject to which they refer, and the evident purpose of the writer.

"The words are not necessarily technical, and in civil jurisprudence they are not considered to be words of art, and, although it has been said that they have a well-defined signification in law, they are elastic words, and have acquired no peculiar meaning in law

which is universally accepted. In certain branches of the law they do have a technical or special meaning, and there is a difference in meaning in common usage and as used in the field of criminal law, and *when used in penal statutes and in statutes dealing with crime they have a restricted meaning which is accepted, well-understood, and well-defined, but even in the field of criminal law the meaning of the terms is rather flexible. When used in penal statutes and in statutes dealing with crime the words are strong and forceful, and of substantial meaning, and are to be given force and effect.*" (Emphasis supplied.)

And at pages 624 and 625 of 94 *Corpus Juris Secundum*, the discussion continues:

"The words 'willful' and 'willfully' imply such elements as design, intent and purpose, deliberation, determination, and premeditation; and they are commonly employed to denote an act which is wrongful or prohibited by law, and also to indicate the intentional and deliberate doing of a wrongful act; the doing of a forbidden act purposely in violation of law.

"The terms may import a specific intent to violate the law; a specific intent to do what the law forbids; a deliberate intent or a purpose to do a wrongful act; an intent to commit a wrong either through actual malice or from which malice will be imputed; a deliberate purpose to accomplish something forbidden; a determination to do the act although known to be forbidden; a determination to execute one's will in spite of defiance of the law; a determination to do a prohibited act with a bad intent and without justifiable excuse; a deliberate intention for which there is no reasonable excuse. *The terms may, therefore,*

denote a conscious or intentional violation of law, and convey the idea of an act done with knowledge that it is unlawful, and they are sometimes used to signify that a person has failed to obey a statute, having knowledge of the facts.” (Emphasis supplied.)

Perhaps the leading case in point, and certainly the one most frequently quoted and relied upon in later decisions of the Circuit Courts of Appeals, is *United States v. Illinois Central Railroad Co.*, 303 U. S. 239. This is one of the cases cited in the Memorandum Decision of the District Court. [R. 71.] In appellant’s brief, 113 decisions are cited or mentioned, but not this one. This was an action to recover a penalty for willful failure to unload, feed and water cattle for over twenty-eight hours. At pages 242 and 243, the Supreme Court said:

“Our opinion in *United States v. Murdock*, 290 U. S. 389, 394, shows that it (the word willfully) often denotes that which is ‘intentional, or knowing or voluntary, as distinguished from accidental’, and that it is employed to characterize ‘conduct marked by careless disregard whether or not one has the right so to act’ . . . “*Willfully*” means something not expressed by “*knowingly*”, else both could not be used conjunctively’ . . . ‘So, giving effect to these considerations, *we are persuaded that it means purposely or obstinately* and is designed to describe the attitude of a carrier, who, having a free will or choice, *either intentionally disregards the statute or is plainly indifferent to its requirements.*’ That statement has been found a useful guide to the meaning of the word ‘willfully’ and to its right application in suits for penalties under section 3.” (Emphasis supplied.)

The definition of the word "willfully," which the Supreme Court in the *Illinois Central* case quoted and termed "a useful guide," was pronounced by Mr. Justice Van Devanter, then a Judge of the 8th Circuit Court of Appeals, in *St. Louis & San Francisco Railroad Co. v. United States*, 169 Fed. 69, 70. That case is not cited in appellant's brief. It was quoted with approval in other cases not cited by appellant, including *Oregon-Washington Railroad & Navigation Co. v. United States* (C. A. 9), 205 Fed. 337, 339, *Zimberg v. United States* (C. A. 1), 142 F. 2d 132, 137, and *Kempe v. United States* (C. A. 8), 151 F. 2d 680, 688.

In the most recent case cited in appellant's brief, *Riss & Co. v. United States* (C. A. 8), 262 F. 2d 245, 248, which was an action to recover a penalty for willful violation of an Interstate Commerce Commission rule limiting the driving time of operators of motor common carriers, the Court not only quoted and adopted Justice Van Devanter's definition of "willfully," but it added its own emphasis to the words "*either intentionally disregards the statute or is plainly indifferent to its requirements.*"

Another pertinent case not cited in appellant's brief is *Nabob Oil Co. v. United States* (C. A. 10), 190 F. 2d 478. That case arose out of an indictment for willful violation of the Fair Labor Standards Act. The Court of Appeals for the Tenth Circuit was called upon to consider the propriety of this jury instruction (p. 479):

"The word 'wilfully' connotes an intentional violation of the law. And you are advised, gentlemen of the jury, *that a defendant who actually does violate the provisions of the Fair Labor Standards Act would not be guilty of a criminal offense unless he is either conscious of the fact that what he is doing*

constitutes a violation of the Act or unless he wholly disregards the law and pursues a course without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law or not .” (Emphasis supplied.)

The Court of Appeals approved that instruction, saying (p. 480):

“We have, however, considered the sufficiency of the instruction and are of the opinion that *the definition correctly defines the term ‘willful’ as used in statutes such as the one being considered here.*” (Emphasis supplied.)

In its Memorandum Decision the District Court cites *Nicastro v. United States* (C. A. 10), 206 F. 2d 89, an action which arose under the Price Control Act, and quotes from it the following [R. 71]:

“The word ‘wilful’ as used in the statute means voluntary, knowing, and intentional, as distinguished from accidental, involuntary or unintentional. It does not mean with an evil purpose or criminal intent. Practicable precaution against the occurrence of the violation . . . means the exercise of ordinary care and caution to avoid the commission of the wrong.”

The Court of Appeals in that case went on to show what does and what does not constitute ordinary care and caution to avoid a violation, and its holding is particularly fitting to the case at bar, in the light of the undisputed facts. The Court of Appeals said (p. 92):

“All the owners did in respect to the exercise of ordinary care and caution to avoid the commission of the wrong was to entrust the whole matter to the

judgment of their bookkeeper. *They did not seek legal advice nor official interpretation with respect to the effect of their increasing the price of beverages, or otherwise inquire with respect to whether such increases would result in a violation of the regulation.* Clearly, their acts were wilful and they failed to take any practicable precautions against an occurrence of their violation.” (Emphasis supplied.)

It is submitted that under the well established rules of interpretation laid down by the authorities cited above, it could not be found that the appellees “willfully” exceeded any quota or allotment fixed for Lo Bue Brothers by the Secretary of Agriculture, in the face of the undisputed facts that while the appellees knew that the shipments in question were in excess of Lo Bue Brothers’ allotment, they relied upon the advice of their counsel that the 15(A) petition had been filed, and that therefore they had a legal right to make these shipments, that they would not otherwise have made the shipments, and that in making them they had no intention of violating the marketing order or the law, and did not believe that they were violating the same.

The Appellees Acted in Good Faith.

The District Court found that Lo Bue Brothers acted in good faith in filing its 15(A) petition and in making the shipments in question. [R. 90.] The lengthy argument in appellant’s brief as to the status and treatment of findings of fact on appeal seems unnecessary, since the subject is fully covered and governed by Rule 52(a) of the Federal Rules of Civil Procedure, which is not cited by appellant.

The appellant attacks the finding of good faith on several grounds. Great stress is laid upon the statements made by the appellee Woodall at meetings of the Navel Orange Administrative Committee to the effect that he intended to find some way to ship his fruit. The appellant continues to ignore the fact that Mr. Woodall appeared at those meetings on his own behalf as a navel orange grower and was not authorized to represent or speak for his employer Lo Bue Brothers, and that he was referring only to shipment of his own fruit. [R. 137-143, 146.]

Then the appellant again selects an isolated, out-of-context statement from the testimony of Mario Lo Bue as "undisputed evidence" that the petition was filed "only for the purpose of permitting the defendants to ship their excess fruit." (Br. p. 59.) Appellant ignores, for example, this testimony by Mr. Lo Bue:

"Q. What did you have in mind primarily in filing this petition? A. We thought our legal rights was being violated by having this fruit go to waste.

Q. Did I advise you that the only way to proceed, in order to get a determination on those rights, was through the filing of a 15(A) petition? A. Yes." [R. 107, 108.]

Next, the appellant argues that Lo Bue Brothers manifested no interest in the outcome of the 15(A) petition after it was filed, basing this unwarranted conclusion on the fact that Mr. Woodall, sales manager for Lo Bue Brothers, testified that he could not remember whether he had conferred with Lo Bue Brothers' attorney before the day of the hearing on the petition, and on the further fact that Lo Bue Brothers did not appeal to the District

Court from the adverse ruling of the Judicial Officer on the petition.

In the first place, Mr. Lo Bue was not asked whether he had conferred with his attorney in preparation for the hearing. In the second place, it was stipulated that at the hearing on the petition Lo Bue Brothers was present with counsel at the hearing and introduced oral and documentary evidence in support of the petition, and that Lo Bue Brothers filed a brief, and also filed written exceptions to the report of the Hearing Examiner. [R. 27, 28.] Furthermore, the proceedings at the hearing on the 15(A) petition are incorporated in the Transcript of Record herein. [R. 199-331.] It will be observed that the transcript of the oral proceedings at the administrative hearing is somewhat longer than the transcript of the oral proceedings at the trial in the District Court.

It is true, of course, that Lo Bue Brothers did not appeal to the District Court. It is also true that the Judicial Officer's adverse decision was not issued until December 3, 1956. [R. 28.] By that time the next navel orange shipping season was well under way, and the Navel Orange Administrative Committee was not proposing to repeat its unprecedented action of restricting the shipment of Central California navel oranges beyond their historical marketing period. The question raised by Lo Bue Brothers 15(A) petition was not technically moot, but for all practical purposes it was moot, so Lo Bue Brothers decided not to press its contentions further.

Generally, the appellant refers rather contemptuously to the filing of a 15(A) petition as a "maneuver," and seems to take the position that the very fact that a petitioner has the temerity to avail himself of his right under the statute to disregard the obligation imposed upon him of which he

complains, from the time he files his petition with the Secretary of Agriculture until he is served with a restraining order, is alone sufficient to establish his lack of good faith in filing the petition. If such a contention were upheld, it would completely nullify the statutory provision and would thwart and defeat the obvious intent of the Congress in enacting it.

On the other hand, there are several circumstances which completely refute the appellant's argument against the good faith of Lo Bue Brothers in filing its petition. It should be remarked, parenthetically, that the phrase in the statute, "and not for delay," has no application here, because there was nothing that could be delayed by the filing of this petition.

First of all, Lo Bue Brothers, having stated its complaint to an attorney experienced in such matters, was advised by him that in his opinion there was grave doubt as to the legality of the action of the Advisory Committee complained of. In his decision the Judicial Officer held, at least inferentially, that Lo Bue Brothers' petition presented substantial and important questions. [R. 340.]

Next, despite the vigorous contention and urging of counsel for the Department of Agriculture at the administrative hearing and in his brief that there should be a finding of lack of good faith on the part of Lo Bue Brothers in filing its petition, the Department's Judicial Officer refused to make such a finding or conclusion. [R. 347, 88.]

Finally, in spite of all the argument in its brief, the appellant has tacitly admitted that Lo Bue Brothers' 15(A) petition was filed and prosecuted in good faith. In paragraph XI of the complaint herein it is alleged that during the weekly period covered by Regulation No. 82,

April 8 to April 15, 1956, Lo Bue Brothers exceeded its allotment by 8,848 cartons, 2,933 cartons of which were handled in excess of allotment "prior to April 9, 1956, the date on which Lo Bue filed with the Secretary a petition under Section 608c(15)(A) of the act." [R. 8.] Yet the appellant sought to recover a penalty or forfeiture only on the 2,933 excess cartons handled prior to April 9, and not on the 5,915 additional excess cartons handled on and after April 9 and until a restraining order was issued and served on April 12. [R. 9, 10.] That can mean only one thing, namely, that the appellant has conceded that Lo Bue Brothers' petition was filed and prosecuted in good faith, and that it therefore protected Lo Bue Brothers on the 5,915 excess cartons shipped after it was filed. If it had not been filed and prosecuted in good faith, it would have afforded no protection at all.

It is submitted that the finding of the District Court that Lo Bue Brothers acted in good faith is fully supported and justified by the evidence, and is, indeed, the only finding on that point that could possibly be made.

The Advice Relied Upon by Appellees Was Fully Justified.

The Congress was well aware that as a practical matter the administrative procedure to be followed upon the filing of a petition under Section 608c(15)(A) of the Act would be much too slow to afford any relief whatever to a petitioner from an order or obligation imposed in connection therewith, no matter how unreasonable or unlawful it might be, in the case of perishable commodities. Therefore, by Section 608c(14) it exempted petitioners, filing and prosecuting petitions in good faith and not for delay, from penalties for violations occurring between the date upon which the petition was filed with the Secretary

and the date upon which notice of the Secretary's ruling thereon was given to the petitioner.

It is inconceivable that Congress intended to protect such petitioners from maximum fines of \$500.00 for violations occurring during the pendency of a petition and at the same time leave them subject to unlimited civil penalties or forfeitures for the same violations, which could run into hundreds of thousands or even millions of dollars. And there is definite evidence that Congress had no such intention.

The provisions of law of which 7 U.S.C. 608a and 7 U.S.C. 608c are a part were originally enacted as Title I of the Agricultural Adjustment Act of May 12, 1933, 48 Stat. 31. The original of 608a was added to said Title I by the Act of May 9, 1934, 48 Stat. 670. Said Title I was further amended by the Act of August 24, 1935, 49 Stat. 750. This 1935 Act added the present Section 608c (14) and (15), 49 Stat. 759, 760. The 1935 Act originated as Bill No. H.R. 8492. When that Bill went to the Senate, the Senate Committee on Agriculture and Forestry in reporting it out recommended an amendment to Section 608c(14) to make the proviso read as it does in its present form. The second paragraph of the comments of the Senate Committee, Senate Report 1011, 74th Congress, page 14, is in part as follows:

“During the period while any such petition is pending before the Secretary and until notice of the Secretary's ruling is given to the petitioner, *the penalties imposed by the Act for violation of an Order cannot be imposed upon the petitioner* if the Court finds that the petition was filed in good faith and not for delay. The Secretary may, nevertheless, during this period proceed to obtain an injunction against the petitioner pursuant to Section 8a (6) of the Agricultural Ad-

justment Act. . . . It is believed that these provisions establish an equitable and expeditious procedure for testing the validity of orders, without hampering the Government's power to enforce compliance with their terms." (Emphasis supplied.)

This legislation was reenacted by the Act of June 3, 1937, 50 Stat. 246.

During the entire existence of this legislation, only three attempts have been made to impose penalties or forfeitures under Section 608a(5), prior to the present case. Those three actions are the ones referred to in the District Court's Memorandum Decision. [R. 65-67, 70, 71.] They are *United States v. William S. Wright*, No. 3036-H-Civil, *United States v. Alexander Chaskin*, No. 3065-O'C-Civil, and *United States v. A. Levy & J. Zentner Co., et al.*, No. 3081-H-Civil, all in the Southern District of California, and all decided by the late Judge Harry A. Hollzer in 1944. In all three of these cases the Court held that the immunity provided by the proviso in Section 608c(14) extended to civil penalties as well as criminal penalties.

In the *A. Levy & J. Zentner Co.* case, the Court made the following conclusions of law:

"The defendant Vincent J. Squillante, having failed to file a petition pursuant to said subsection (15) of Sec. 608(c) Title 7 U.S.C. and having aided and abetted in the commission of the violation described herein, is liable on account thereof. Said statute is penal in its nature and must be strictly construed.

"The plaintiff is entitled to recover against the defendant Vincent J. Squillante, the statutory forfeitures provided in Sec. 608(a) Title 7, U.S.C. subsection 5." [R. 66, 67.]

In the *Wright* and *Chaskin* cases the Court made identical conclusions of law, except for the names, as follows:

“That the provisions of the statute under which these actions are being prosecuted are penal in character and therefore must be construed strictly.

“Since a petition pursuant to Subsection 15, Section 608(c) Title 7 U.S.C. was filed and prosecuted by defendant, William S. Wright, in good faith and not for delay, no penalty can be imposed and no forfeitures can be recovered against said defendant William S. Wright for any of the violations involved herein.” [R. 66.]

No appeal was taken by the United States from any of the above decisions. [R. 66.]

Now the appellant is seeking to attack Judge Hollzer's decisions collaterally. The elaborate argument in appellant's brief would have been equally applicable in 1944, and it should have been made in an appeal at that time, if the appellant is so sure that these decisions were wrong. The District Court correctly held that the soundness of Judge Hollzer's decisions is not an issue in the present case. [R. 67.]

The lengthy, theoretical, economic argument of appellant, designed to show that triple forfeitures are essential to enforcement of regulations issued under the Act, falls very flat when it is remembered that this particular legislation has been in effect for 22 years, that during all that time only three previous attempts have been made to collect triple forfeitures, all in 1944, and that enforcement during the ensuing 15 years has apparently progressed satisfactorily.

It is difficult to understand how the appellant can maintain that the legal advice given the appellees, based on the only court decisions on the subject in the entire United States, was erroneous. [R. 182, 69, 89, 90.] Can the government set traps for its citizens by failing to appeal from adverse decisions and allowing them to stand as the law of the land, and then claim that a citizen has no right to rely on the advice of his attorney given in conformity with those decisions?

Despite all of its arguments to the contrary, the appellant has tacitly admitted that the immunity proviso in Section 608c(14) of the Act does apply to the triple forfeitures provided for in Section 608a(5), just as Judge Hollzer decided that it did. As pointed out above, paragraph XI of the complaint herein alleges that during the weekly period covered by Regulation No. 82, April 8 to April 15, 1956, Lo Bue Brothers exceeded its allotment by 8,848 cartons, 2,933 cartons of which were handled in excess of allotment "prior to April 9, 1956, the date on which Lo Bue filed with the Secretary a petition under Section 608c(15)(A) of the act." [R. 8.] Yet the appellant sought to recover a penalty or forfeiture only on the 2,933 excess cartons handled prior to April 9, and not on the 5,915 additional excess cartons handled on and after April 9, and until a restraining order was issued and served on April 12. [R. 9, 10.] That means, not only that the appellant has conceded that Lo Bue Brothers' petition was filed and prosecuted in good faith, as pointed out above, but also that the filing of it protected Lo Bue Brothers from the triple forfeitures of Section 608a(5), as well as from criminal penalties, on the 5,915 excess cartons shipped after the petition was filed. There is no other possible explanation of the failure of the appellant

to ask for triple forfeitures on those 5,915 additional excess cartons.

In the final analysis, therefore, the appellant's entire case rests solely upon the fact that Lo Bue Brothers made 23 shipments in excess of allotment on Saturday, April 7, 1956, and 3 more excess shipments after midnight on Saturday, that is, early in the morning of Sunday, April 8, 1956 [R. 129] in the mistaken belief that the 15(A) petition was on file, while as a matter of fact it was not actually filed until Monday, April 9, 1956. That information had been given to the appellees by their attorney, and it was based upon knowledge acquired from long, specialized experience in this particular field. [R. 183, 184, 186, 69, 70, 72, 89, 90, 91.]

The 15(A) petition of Lo Bue Brothers was air mailed at Los Angeles on April 5, 1956, and was postmarked at Washington, D. C. on April 6, 1956. [R. 35.] Their attorney's experience, over many years, was that such petitions, air mailed from Los Angeles, were always received and filed by the Secretary of Agriculture the next day. [R. 183, 184, 67, 68, 90.] In this instance, however, the petition was held in the post office at Washington, D. C. from about 2:00 P.M., on Friday, April 6, 1956, until the following Monday, April 9, 1956. [R. 87.]

There is no way of knowing what actually happened, since all those who handled this mail frankly admit that they have no personal recollection or knowledge of the matter, and base their conclusions entirely upon the records shown to them. The only explanation offered for the delay is the inference that this piece of mail arrived at the Washington post office after some arbitrary deadline on Friday, April 6. But that does not check out with the testimony on the subject, which was that "The afternoon

mail for the Agriculture Dept. leaves the United States Post Office at approximately 2:30 to 3:00 p. m. daily except Saturday and Sunday when there is no delivery. Mail arriving at the U. S. Post Office for the Agriculture Dept. after approximately 2:00 p. m. on Friday is held over until the first delivery on Monday morning.” [R. 37, 38.] Since this petition did arrive at the U. S. Post Office about 2:00 P. M. on Friday, April 6, [R. 87] an error of some kind or mere carelessness on the part of some postal clerk may have prevented it from being delivered to the Department of Agriculture on that day. Whatever happened, it was beyond the knowledge or control of the appellees, and was contrary to the ordinary course of businesses, as established by long experience and relied upon by the appellees.

Advice and information was given to and recovered and acted upon by the appellees in complete good faith. [R. 72, 90, 91.] It is submitted that the legal advice given was strictly in accordance with the law, and the information given was fully justified by the facts, and that the appellees had every right to act in reliance upon such advice and information.

PART II.

The Facts Behind the *Amicus Curiae* Brief.

The appellees have known from the beginning that the prosecution of this case was instigated and pressed by Sunkist Growers, Inc. Now that Sunkist has come out into the open by filing an *amicus curiae* brief in behalf of the appellant, it becomes necessary to apprise this Court of the underlying facts.

In the opening paragraph of its brief, Sunkist Growers, Inc. gives a modest indication of its size. The original name of this cooperative marketing association was California Fruit Growers Exchange. It changed its name to Sunkist Growers, Inc. to match its top grade brand. This organization controls and markets at least 65% of all the oranges grown in California, and at least 86% of all the lemons grown in California. The extent of this control in the case of lemons is emphasized by the fact that approximately 96% of all the lemons in the United States are produced in California.

Sunkist Growers, Inc. has long boasted that it is the world's largest agricultural cooperative marketing organization. And this may well be true. At any rate, it wields tremendous economic and political power and influence. It has always been a sacred cow of the Department of Agriculture, and this administration is no exception. For instance, shortly after the present Secretary took office, Mr. Karl D. Loos, who is the Sunkist Washington counsel and lobbyist, and whose name is on the brief, was appointed and served for a time as General Counsel of the Department of Agriculture. And Mr. F. R. Wilcox, the Treasurer and General Manager of Sunkist Growers, Inc., was called to Washington to assist in "reorganizing" the Department.

These, and the other top officials of Sunkist Growers, Inc., are all estimable gentlemen, personally. But the organization is a ruthless monopolist which will stop at nothing to impede, cripple, and if possible destroy its competitors.

This is no figment of imagination. Since November 16, 1942, Sunkist Growers, Inc., and its subsidiaries and affiliates, have been subject to the terms of a consent decree made and entered by the United States District Court, Southern District of California, in an action entitled *United States of America v. California Fruit Growers Exchange, et al.* No. 2577-BH, permanently enjoining and restraining them from committing further acts in violation of the anti-trust laws, including a prohibition against obstructing, restricting, or interfering with the purchase by others of fruit through any particular channel or place. That case was prepared and instituted by Mr. Justice Clark of the Supreme Court, who was at that time in charge of the Los Angeles office of the Anti-Trust Division of the Department of Justice. In addition, there are at least two suits by competitors for treble damages under the anti-trust law pending against Sunkist at the present time.

Sunkist Growers, Inc. has always been an enthusiastic supporter of marketing orders under the Agricultural Marketing Agreement Act. Under the provisions of Section 608c(12) of the Act, Sunkist, as a cooperative marketing organization, can and does vote in referendums for or against proposed marketing orders and for or against termination of existing marketing orders, not only for all

of the member growers whose fruit it markets, but also for all non-member growers whose fruit it markets. By thus controlling the nature of the marketing orders put into effect, and through top-heavy representation on the industry committees which administer the orders, Sunkist completely dominates these programs. With the power of Government behind it, this is a potent weapon in the hands of a giant monopolist.

The present case presented in the eyes of Sunkist a golden opportunity to dispose of one more small independent competitor, Lo Bue Brothers, by having a penalty imposed upon the partners, and even upon their sales manager, in an amount which would most certainly bankrupt them all. The behind-the-scenes role played by Sunkist was obvious from the first. At the administrative hearing on Lo Bue Brothers' 15(A) petition, the opposition witnesses produced by counsel for the Department of Agriculture were Sunkist officials who were also members of the Navel Orange Administrative Committee. The principal witness was Mr. M. D. Street, Assistant Treasurer and chief economist of Sunkist Growers, Inc., and also a Committee member, who produced all the charts, graphs, and statistics relied upon by counsel for the Department of Agriculture to defeat Lo Bue Brothers' petition. [R. 281-317.]

In its brief in support of its 15(A) petition Lo Bue Brothers commented on this as follows:

"In the present instance, the opposition presented by counsel for the Department, while nominally that of the Department itself, was actually the opposition

of Sunkist Growers, Inc. The documentary evidence introduced consisted for the most part of statistics, charts, and graphs prepared by Sunkist from sources chosen by Sunkist; and the principal opposition witness was the top Sunkist economist, who also happens to be a member of the Advisory Committee, (M. D. Street) and who delivered himself of a long-winded exposition of standard Sunkist dogma to the effect that the sole salvation of the California citrus industry lies in more and more rigid volume controls, administered by Sunkist and enforced by Government.

“The Sunkist statistics, charts, and graphs introduced in evidence (if all of the premises, assumptions, suppositions, speculations, estimates, projections, computations and just plain guesses which went into them be accepted as entirely true and correct) were evidently designed to indicate that it least some of the Navel growers, including some in Central California, did pretty well this past season—all things considered. This the aforesaid Sunkist witness characterized as a ‘miracle.’ He mentioned, incidentally and casually, that total destruction of the crop in Spain had opened up unprecedented export markets, but, quite typically, he gave exclusive credit for the ‘miracle’ to himself and his fellow miracle workers on the Advisory Committee.”

Mr. M. D. Street also appeared as a witness for the appellant at the trial of this case in the District Court. [R. 143-149.]

The evident purpose of this *amicus curiae* brief is to try to show that an offense has been committed by the Lo Bue Brothers so heinous as to justify their economic execution, and to try to make their hoped-for economic death both plausible and palatable.

The "Facts" in the *Amicus Curiae* Brief.

This *amicus curiae* brief is really not a brief at all. It is, for the most part, an economic essay. Much of it bears evidence of having been ghost-written by some Sunkist economist; possibly by the head man, Mr. Street.

We do not deem it necessary to enter into a debate with Sunkist over the merits of marketing orders in general. It is noted that much of the economic argument in this brief is based on material and matters entirely outside the record in this case. The brief contains some weird flights of fancy and some of the wildest statements imaginable. Its author at least has the grace to admit that his conclusions are not provable (Br. pp. 13, 14), but that is a gross understatement. Most of these conclusions could be disproved, if they were relevant. We shall limit ourselves to brief comment on a few of the more palpable misstatements.

On page 12 of its brief, Sunkist tries to make it appear that Lo Bue Brothers was responsible for a drop in the price and a decrease in the volume of navel oranges marketed during the week commencing April 8 and ending April 15, 1956. In other words, Sunkist is saying that the twenty-six shipments made by Lo Bue Brothers before April 9 depressed the nationwide market for navel oranges and forced the Navel Orange Administrative Committee to sharply curtail the total quantity of navel oranges allowed to be marketed during the week of April 8.

In the first place, only two of Lo Bue Brothers' twenty-six shipments were actually sold before April 9, and the gross selling price was \$3,520.75. [R. 84.]

In the second place, the permissible volume of shipments for any week is fixed by the Administrative Committee and the Secretary of Agriculture not later than

Friday of the preceding week, so that the authorized volume of navel oranges for the week commencing April 8, 1956 was fixed by Friday, April 6, 1956, which was before Lo Bue Brothers had made any of the twenty-six shipments in question.

In the third place the weekly average f. o. b. price of Central California navel oranges, as reported by Sunkist, rose steadily, with some fluctuation, during April and May, 1956, as follows [R. 337]:

April 7	—	\$1.87
April 14	—	1.75
April 21	—	1.95
April 28	—	2.29
May 5	—	2.22
May 12	—	2.45
May 19	—	2.59
May 26	—	2.55

Sunkist's doctrinaire explanation, of course, is that the upward trend was due solely to the enforced restriction of the volume marketed, and that the total destruction of Spain's crop by frost had no bearing on the situation.

In its hysterical buildup to the remarkable conclusion, at the top of page 15 of its brief, that unless the Lo Bue Brothers are punished Sunkist-style, by being put out of business, the whole agricultural economy of the West Coast area may collapse, Sunkist conveniently overlooks a number of obvious facts.

First, what is the explanation of the fact that the Florida citrus industry has gotten along quite well without ever having had a marketing order restricting or regulating the volume of fruit marketed? Could it be that Florida thrives on the market abandoned to it when California restricts the volume of its shipments?

Second, if, as Sunkist says, non-compliance is so contagious, all of the California citrus marketing order should have been destroyed long ago; for many 15(A) petitions have been filed in the past, raising many legal questions concerning all of them.

Third, Congress thought the injunctive remedy provided by Section 608a(6) of the Act afforded sufficient protection against 15(A) petitioners who might seek to avail themselves of the immunity provided by Section 608c(14). That injunctive remedy has been promptly applied to nullify the immunity in each and every 15(A) case. It must be remembered that Lo Bue Brothers was restrained on April 12, 1956, and consented to a *permanent* injunction on April 19, 1956. [R. 88, 89.] Sunkist does not think that remedy is sufficient. It thinks Lo Bue Brothers, and its sales manager, should be penalized in the sum of \$149,612.22 on the \$1,800.00 netted by Lo Bue Brothers on the twenty-six shipments in question [R. 84] even though no attempt has been made so to penalize any other violator in the past fifteen years.

What Sunkist is really saying is that it doesn't like the right given by the statute to file a 15(A) petition, or at least the right of immunity that goes with it, and thinks it should be abolished. Sunkist can accomplish that result, for all practical purposes, if it can have the Lo Bue Brothers crucified, as a warning to others not to exercise their right to this "maneuver" (they all seem to like that word) no matter how unlawful a marketing order or regulation may be.

It would seem that Sunkist should have its Washington lobbyist, Mr. Loos, try to persuade the Congress to amend the statute, rather than ask this Court to condemn it.

Conclusion.

The findings and conclusions of the District Court are fully supported by the facts and the law of this case, and are, indeed, inescapable. The judgment appealed from should therefore be affirmed.

Respectfully submitted,

G. V. WEIKERT,

Attorney for Appellees.

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

LO BUE BROTHERS, a Partnership; MARIO LO BUE,
FRED LO BUE, and JOSEPH LO BUE, Partners;
and WILLIAM LUTHER WOODALL, DEFENDANTS-
APPELLEES

On Appeal from the United States District Court for the
Southern District of California, Northern Division

REPLY BRIEF FOR THE UNITED STATES OF
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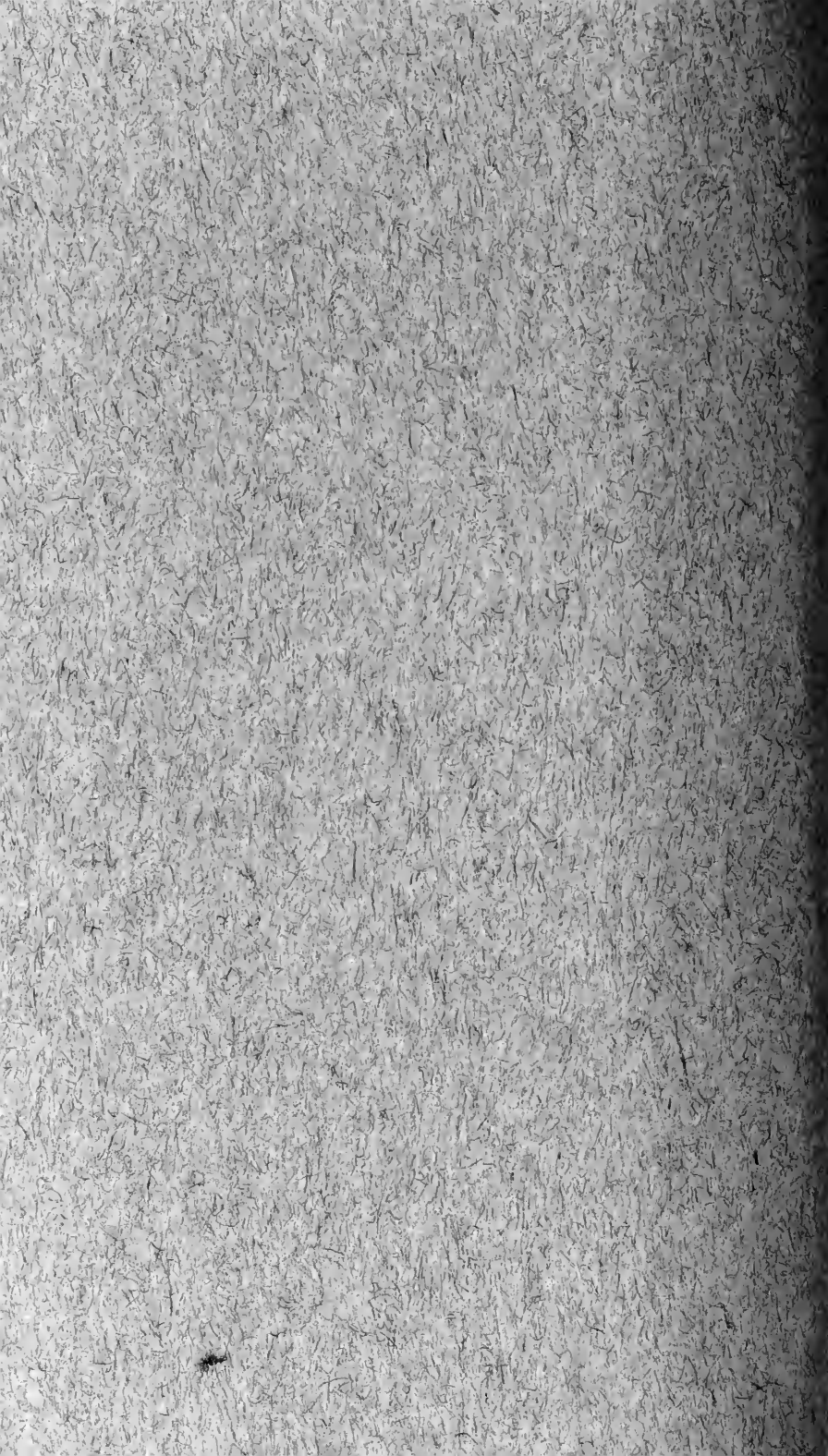
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 16,230

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

**LO BUE BROTHERS, a Partnership; MARIO LO BUE,
FRED LO BUE, and JOSEPH LO BUE, Partners;
and WILLIAM LUTHER WOODALL, DEFENDANTS-
APPELLEES**

**On Appeal from the United States District Court for the
Southern District of California, Northern Division**

**REPLY BRIEF FOR THE UNITED STATES OF
AMERICA, APPELLANT**

We shall not attempt in this reply brief to repeat or restate the arguments set forth in our main brief. A few paragraphs will suffice to focus the issues and to mark out some of the irrelevant and erroneous arguments in the brief filed by the defendants, *i.e.*, the appellees.

I. The Cases Relied On By The Appellees, In Their Brief, Relative To The Meaning Of The Word "Will-fully" Do Not Support The Appellees' Argument, And Their Reliance On Those Cases Is Misplaced.

The appellees cite in their brief, pp. 13-18, eight cases with respect to the meaning of the word "will-

fully” in § 8a(5) of the Act. A brief analysis of the eight cases is sufficient to show that the appellees’ reliance on those cases is misplaced.

The first case which is relied on by the appellees, in their brief, pp. 15-16, is *United States v. Illinois Cent. R. Co.*, 303 U. S. 239, and the appellees characterize it as “[p]erhaps the leading case in point, and certainly the one most frequently quoted and relied upon in later decisions of the Circuit Courts of Appeals * * *.” We agree that it has been quoted and relied on in subsequent cases, but the appellees failed, in their brief, to explain that it is cited and relied on in *United States v. Gris*, 247 F. 2d 860, 864 (C. A. 2), and *Trenton Chemical Co. v. United States*, 201 F. 2d 776, 777-780 (C. A. 6), certiorari denied, 345 U. S. 994, which as shown in our main brief, pp. 52-53, 56-57, are squarely in point, in the case at bar, in support of our interpretation of the term “willfully” in § 8a(5) of the Act.

The Court, in holding the defendants liable as “willful” violators in *United States v. Illinois Cent. R. Co.*, *supra*, 303 U. S. 239, said that in “statutes denouncing offenses involving turpitude, ‘willfully’ is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication” (*id.* at 242). The subsequent decision in *United States v. Gris*, *supra*, 247 F. 2d 860, 864 (C. A. 2), in which the defendant was convicted of “willfully and knowingly” violating the Federal Communications Act, is based on *United States v. Illinois Cent. R. Co.*, *supra*. The Court

held in the *Gris* case (247 F. 2d at 864) that: "It matters not whether appellant realized his conduct was unlawful. He knew exactly what he was doing; and what he did was in violation of the Federal Communications Act. He intended to do what he did, and that is sufficient. *United States v. Illinois Cent. R. Co.*, 303 U. S. 239, 58 S. Ct. 573, 82 L. Ed. 773." The decision in the *Gris* case is of course diametrically contrary to the appellees' argument in their brief, p. 18, that they are not willful violators if they did not intend or "believe" that the excess shipments would subject them to liability under § 8a(5) of the Act.

The case of *United States v. Illinois Cent. R. Co.*, *supra*, 303 U. S. 239, is also cited in *Trenton Chemical Co. v. United States*, *supra*, 201 F. 2d 776, 779-780, in which the defendant was held liable for having "willfully" exceeded a quota restriction. The defendant contended in the *Trenton Chemical Company* case, *supra*, that it used grain products, not grain, and "that it had been advised by its attorney that it was not illegal to use grain products in its distilling operations," but the "District Judge declined to permit the * * * [Company] to show at the trial that it acted in good faith and on advice of counsel that its acts were not illegal, in using the materials in question" (201 F. 2d at 778-779). In affirming the judgment of the District Court, the Court of Appeals held that inasmuch as the regulatory statute did not proscribe acts "in themselves wrong" evidence of "bad faith or evil purpose on the part of the defendant was not necessary to con-

stitute a violation of the act but it was sufficient if the prohibited act was intentional or voluntary" (201 F. 2d at 780).

The appellees direct attention in their brief, p. 15, to the fact that in our main brief we did not cite *United States v. Illinois Cent. R. Co.*, *supra*, 303 U. S. 239. To be sure, we did not cite the case, but we specifically relied in our main brief, pp. 52-53 and 56-57, on *Trenton Chemical Co. v. United States*, *supra*, 201 F. 2d 776, 777-780 (C. A. 6), certiorari denied, 345 U. S. 994, and *United States v. Gris*, *supra*, 247 F. 2d 860, 864 (C. A. 2), which, as we have shown, apply the doctrine of the *Illinois Central Railroad Company* case, *supra*, and it is sufficient to say that the *Illinois Central Railroad Company* case is in accord with our interpretation of the word "willfully" in § 8a(5) of the Act.

The second and third cases relied on by the appellees in their brief, p. 16, are *St. Louis & S. F. R. Co. v. United States*, 169 Fed. 69 (C. A. 8) and *Oregon-Washington R. & Nav. Co. v. United States*, 205 Fed. 337 (C. A. 9). These cases, however, are discussed in *United States v. Illinois Cent. R. Co.*, *supra*, 303 U. S. 239, 242-243, which, as we have shown, is in accord with our interpretation of the statutory term "willfully." Hence the appellees' reliance on *St. Louis & S. F. R. Co. v. United States*, *supra*, and *Oregon-Washington R. & Nav. Co. v. United States*, *supra*, is misplaced.

The fourth and fifth cases relied on by the appellees in their brief, p. 16, relative to the term "willfully," are *Zimberg v. United States*, 142 F. 2d 132 (C. A. 1), certiorari denied, 323 U. S. 712, and

Kempe v. United States, 151 F. 2d 680 (C. A. 8). The *Zimberg* case is a criminal proceeding (142 F. 2d at 133) and the *Kempe* case is also a criminal proceeding (151 F. 2d at 680), whereas the case at bar is a civil action. In affirming the defendants' conviction in the *Zimberg* case on charges of having "willfully" violated the statute, the Court of Appeals referred to *United States v. Illinois Cent. R. Co.*, *supra*, 303 U. S. 239, 242, in holding that the word "willfully" as used in the Emergency Price Control Act means knowingly and intentionally but not malevolently. 142 F. 2d at 137-138. The *Kempe* case cites and follows the holding in the *Zimberg* case. 151 F. 2d at 688.¹ Both of these cases are cited in *Trenton Chemical Co. v. United States*, *supra*, 201 F. 2d at 780, and the holding in the *Trenton Chemical Company* case is apposite in the case at bar. Plainly the *Zimberg* case and the *Kempe* case are in accord with the argument in our main brief, pp. 50-58, with respect to the meaning of the word "willfully."

The sixth case relied on by the appellees in their brief, p. 16, is *Riss & Co. v. United States*, 262 F. 2d 245 (C. A. 8), in which elaborate precautions against a violation of the statute there involved did not preclude liability on a charge of "willfully" violating the statute. The case is cited in our main brief, pp. 54-55, and as explained there it supports our interpretation of the word "willfully."

¹ The criminal conviction in the *Kempe* case was reversed because incompetent evidence, prejudicial to the defendants, was admitted in the case, tried before a jury, in the District Court. 151 F. 2d at 690.

The seventh case relied on by the appellees in their brief, p. 16, is *Nabob Oil Co. v. United States*, 190 F. 2d 478 (C. A. 10). That case was a criminal proceeding, and in affirming the defendant's conviction under an indictment of 17 counts, charging willful violations of the Fair Labor Standards Act, the Court of Appeals held that in "some penal statutes the word willful means that the offense must be committed malevolently, with a bad purpose or an evil mind. These offenses ordinarily involve moral turpitude but in those statutes denouncing acts not in themselves wrong, such an evil purpose or criminal intent need not exist" (190 F. 2d at 480). That interpretation with respect to a violation—such as in the case at bar—which does not involve turpitude is consonant with the argument in our main brief, pp. 51-52.

The eighth case relied on by the appellees in their brief, p. 16, is *Nicastro v. United States*, 206 F. 2d 89 (C. A. 10), involving statutory language which is different from the statutory terms in the case at bar. In the *Nicastro* case, *supra*, in order to reduce the amount of liability the burden was on the defendant—by the express terms of the Act—to prove that the violation was neither willful nor the result of the failure to take practicable precautions against the occurrence of the violation. 206 F. 2d at 90, fn. 1. The reference in the Court's opinion (*id.* at 92) to the failure to seek legal advice relates to whether the defendant took practicable precaution against the occurrence of the violation, and not as to whether the offense was willful (*ibid.*). In affirming

the judgment of the District Court that the defendants were liable for statutory penalties, the Court of Appeals said that the word "willfully" does not mean with an evil purpose or criminal intent (*ibid.*).

The cases relied on by the appellees in their brief give no support to their argument with respect to the meaning of the word "willfully" in § 8a(5) of the Act, and the cases insofar as relevant here support our interpretation of the word "willfully" in § 8a(5). Also the appellees failed to deny, in their brief, that the meaning of the word "willfully" is often influenced by its context. In this case, the various provisions of the Act and the carefully expressed design of Congress are explained in our main brief, pp. 33-50, and under these statutory provisions the erroneous advice given to the appellees with respect to the meaning of the statutory provisions is no defense in an action, as here, for liability under § 8a(5) of the Act.²

² Various contentions and allegations in the appellees' brief are manifestly without merit. *E.g.*, the appellees argue in their brief, pp. 21-22, that suit could have been brought against the appellees for liability under § 8a(5) relative to some additional shipments of navel oranges in excess of the allotments or quotas. Obviously, that does not change the statutory provisions or preclude liability for the excess shipments which are involved in this case. See, *e.g.*, *District of Columbia v. Thompson Co.*, 346 U. S. 100, 113-114; *Phillips Petroleum Co. v. Wisconsin*, 347 U. S. 672, 674-685; *Baltimore & Ohio R. Co. v. Jackson*, 353 U. S. 325, 330-331; *Amshoff v. United States*, 228 F. 2d 261, 265-266 (C. A. 7), certiorari denied, 351 U. S. 939.

II. The Legislative History Relied On By the Appellees, In Their Brief, Does Not Relate to § 8a(5) of the Act and Therefore Does Not Support the Appellees' Argument.

The appellees contend in their brief, pp. 23-28, that the proviso in § 8c(14) of the Act—exempting a handler, for a certain period of time, from liability “under this subsection” for a fine of \$50 to \$500 if a petition pursuant to § 8c(15) (A) of the Act “was filed and prosecuted by the defendant [handler] in good faith and not for delay”—is applicable also to § 8a(5), and the appellees rely, in support of their argument, on certain parts of the legislative history of the Act of August 24, 1935 (49 Stat. 750, 759-760).³

The appellees quote in their brief, pp. 23-24, three sentences from Sen. Rep. No. 1011, 74th Cong., 1st sess., p. 14, but the appellees failed, in their brief, to state that the Senate Report is discussing, in this respect, only the relationship between § 8c(14) and § 8c(15). No reference is made in the Senate Report to § 8a(5) or the liability, as here, for triple forfeiture pursuant to § 8a(5). The statutory amendments made effective by the Act of August 24, 1935, did not involve § 8a(5) which, as shown in our

³ The fourth issue of law to be tried, according to the Stipulation of Facts and Issues in the District Court is “[w]hether the immunity provided by the proviso in 7 U. S. C. 608c(14) applies to this suit” (R. 31). See also the fifth and sixth issues of law which relate to factors involved in the fourth issue of law (R. 31). The District Court, in its memorandum opinion, stated that the appellees relied on the proviso in § 8c(14) of the Act (R. 64-65).

main brief, pp. 38-40, was already in effect. Hence the legislative history of the Act of August 24, 1935, relied on by the appellees, does not support, in any respect, the appellees' argument that the proviso in § 8c(14) is also applicable to § 8a(5). Moreover, as shown in our main brief, pp. 34-35, the proviso in § 8c(14) is limited, by its terms, to a fine of \$50 to \$500 imposed "under this subsection" and it could not, therefore, be applicable to a different subsection, *viz.*, subsection (5), under a different section, *viz.*, § 8a.

III. The Appellees' Allegations, In Their Brief, That The Regulatory Program Is Not Being Administered Properly Are Without Foundation, And The Appellees' Assertions Are Wholly Aside From The Issues Formulated In The Trial In The District Court.

No record reference is given by the appellees with respect to the various allegations in their brief, pp. 29-36, that the program is not being administered properly by the United States Department of Agriculture. No issue in that respect was formulated by the complaint (R. 3-11) and the answer (R. 11-19) or in the course of the trial in the District Court (R. 19-198).⁴ All of the appellees' allegations which tend to discredit the Department or tend to deprive it of good repute, with respect to the Department's administration of the program involved in this case,

⁴ "One of the things that ought to be certain is that parties do not find themselves trying a new and different case on each successive higher branch of the appellate tree." *Union Pacific R. R. Co. v. Johnson*, 249 F. 2d 674, 677 (C. A. 9).

are patently unwarranted and wholly without foundation.

The short answer to the appellees' allegations is that if the program is not being administered in accordance with law an avenue is available to the appellees under § 8c(15) of the Act (7 U. S. C. 1958 ed. § 608c(15)) to resolve any such issue, on the basis of an adjudicatory hearing, and full judicial review is available under § 8c(15)(B). That is the exclusive procedure to which a handler is confined for a determination with respect to the validity of the regulatory program or an obligation imposed on the handler pursuant to the program. *United States v. Ruzicka*, 329 U. S. 287, 292-294; *Panno v. United States*, 203 F. 2d 504, 508-509 (C. A. 9); *LaVerne Co-op. Citrus Ass'n v. United States*, 143 F. 2d 415, 418 (C. A. 9); *United States v. Ideal Farms, Inc.*, 262 F. 2d 334, 334-335 (C. A. 3). The appellees are familiar with that method of determining the legality of administrative action under this statute. The stipulation of facts in this case shows (R. 25-28) that the appellees filed a complaint or petition under § 8c(15)(A) of the Act with respect to the validity of the allotment or quota limitations in this case. The appellees' brief, pp. 3-4, summarizes the allegations in their complaint or petition pursuant to § 8c(15)(A) of the Act, but the appellees failed in their brief to explain that the findings of fact and the decision were adverse to the appellees. It was held by the Judicial Officer in dismissing the appellees' petition, on the basis of the evidence, that the contested allotment or quota limitations were

“reasonable” (R. 343), that the quotas “reflected the particular conditions prevailing in the area” (R. 343), and that the “restrictions imposed were instrumental in attaining excellent returns to growers for the 1955-1956 crop” (R. 343), and that there was “no evidence of discrimination against petitioner [*i.e.*, Lo Bue Brothers, appellees in this case] in the record” (R. 345). “In fact, petitioner [*i.e.*, Lo Bue Brothers] marketed almost five percent more of its 1955-1956 crop in fresh fruit channels than the average marketed by handlers and producers from Southern California,” in that marketing season, and also marketed a higher percentage of its navel oranges “in fresh market channels than the average marketed by handlers in Central California” (R. 345). “[A]ny price differential between Southern and Central California navel oranges appears to have resulted from the characteristics of the two crops rather than the time of the marketing of the respective crops.” (R. 345-346). Although as shown in our main brief, pp. 60-61, the proceeding was not moot as a matter of law, no appeal was taken from the administrative decision (R. 28).⁵

⁵ It is alleged in the appellees’ brief, p. 20, that at the time of the decision of the Judicial Officer, relative to their petition under § 8c(15)(A) of the Act, the “Navel Orange Administrative Committee was not proposing to repeat its unprecedented action of restricting the shipment of Central California navel oranges beyond their historical marketing period,” and that, accordingly, the appellees decided not to appeal from the decision of the Judicial Officer. There is no foundation in the record for that allegation. But in any event, the committee does not establish or prescribe the allotments or quotas. It merely submits recommendations to

It is axiomatic that the Court cannot take the allegations in the appellees' brief as evidence of facts not appearing in the record. *Hussman v. Durham*, 165 U. S. 144, 150. It was said in *Schley v. Pullman Car Company*, 120 U. S. 575, 578, that the brevity of the record and the assertions that the additional facts alleged in the brief on appeal are "incontrovertible" cannot "palliate" the attempt to "influence the decision here, by reference to matters not in the record, and which, he [*i.e.*, the writer of the brief] must have known, could not be taken into consideration."

Although allowance should be made for intensity of zeal and earnestness on the part of counsel, nevertheless we are constrained to suggest that the unwarranted allegations in the appellees' brief, bearing reproachfully on the Department's administration of the program, are manifestly improper. The argument *ad hominem* in the appellees' brief is similar, in effect, to that in *Cox v. Wood*, 247 U. S. 3, 6-7, in which it was said that if the improper argument should subsequently come under observation it "would but serve to indicate to what intemperance of statement an absence of self restraint or forgetfulness of decorum would lead, and would therefore admonish of the duty to be sedulous to obey and respect" the well-known rules. See also, *Green v. Elbert*, 137 U. S. 615, 624; *Royal Arcanum v. Green*, 237 U. S.

the Secretary of Agriculture (7 CFR § 914.51), and the Secretary makes the decision, on the basis of the recommendation "or other available information," relative to the establishment of allotments or quotas (7 CFR § 914.52).

531, 546-547; *Anderson v. Federal Cartridge Corp.*,
156 F. 2d 681, 686 (C. A. 8).

CONCLUSION

For the foregoing reasons, in addition to those in our main brief, it is respectfully submitted that the judgment of the District Court should be reversed and the case remanded with directions to enter judgment for the United States in accordance with the prayer of the complaint.

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